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THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1997 CUMULATIVE SUPPLEMENT

Volume 7

Chapters 28 through 41

Prepared under the supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 486 S.E.2d 626. For complete scope of annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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Preface

This Cumulative Supplement to Volume 7 contains the general laws of a permanent nature enacted by the General Assembly through the 1997 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1997 Regular Session affecting Chapters 28 through 41 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 344, p. 732.
North Carolina Court of Appeals Reports through Volume 123, p. 790.
South Eastern Reporter 2nd Series through Volume 486, p. 626.
Federal Reporter 3rd Series through Volume 116, p. 875.
Federal Supplement through Volume 965, p. 1486.
Federal Rules Decisions through Volume 172, p. 600.
Bankruptcy Reports through Volume 209, p. 549.
Supreme Court Reporter through Volume 117, p. 1864.
North Carolina Law Review through Volume 75, p. 1088.
Wake Forest Law Review through Volume 32, p. 217.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

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The General Statutes of North Carolina
1997 Cumulative Supplement

VOLUME 7

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ARTICLE 1.

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CASE NOTES

Cited in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Jurisdiction Exclusive. — Although § 7A-241 provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," this section specifies that the clerk is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Exclusive Jurisdiction to Appoint Administrators Lies with Clerk of Superior Court. — A superior court judge lacks jurisdiction to appoint an administrator, because the original and exclusive jurisdiction to appoint administrators lies with the clerk of superior court. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Derivative Jurisdiction of Judge. — In most instances the superior court judge's probate jurisdiction is, in effect, that of an appellate court, because his jurisdiction is derivative and not concurrent. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Procedure on Appeal from Order of Clerk. — In an appeal from an order of the clerk in a probate matter, the superior court is not required to conduct a de novo hearing. Rather, when a finding of fact by the clerk of court is properly challenged by specific exception, the superior court judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury, which course he could not follow without hearing evidence. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Action for Breach of Duties, Negligence, and Fraud in Administration of Estate. —

In accord with original. See Ingle v. Allen, 69 N.C. App. 192, 317 S.E.2d 1, cert. denied, 311 N.C. 757, 321 S.E.2d 135 (1984).

Cited in In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); In re Estate of Wright, 114 N.C. App. 659, 442 S.E.2d 540, cert. denied, 338 N.C. 516, 453 S.E.2d 174 (1994).

§ 28A-2-3. Jurisdiction where clerk interested.

CASE NOTES

Applied in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

ARTICLE 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-1. Proper county.

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

(1) In the county in this State where the decedent had his domicile at the time of his death; or

(2) If the decedent had no domicile in this State at the time of death, then in any county wherein the decedent left any property or assets or into which any property or assets belonging to this estate may have come. If there be more than one such county, that county in which proceedings are first commenced shall have priority of venue; or

(3) If the decedent was a nonresident motorist who died in the State, then in any county in the State. (R.C., c. 46, s. 1; C.C.P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C.S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765; 1973, c. 1329, s. 3.)

Editor's Note. — Subdivision (1) of this section is set out above to correct a typographical error in the main volume.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Venue of a proceeding in the nature of a creditor's supplemental proceeding under § 1-307, in which in order to issue an execution on defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by § 1-307, and not by this section. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

Article 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

(a) Letters Testamentary. — Letters testamentary shall be granted to the executor or executors named or designated in the will, or if no such person qualifies, to any substitute or successor executor named or designated in the will. If no person so named or designated qualifies, letters testamentary shall be granted to some other person nominated by a person upon whom the will expressly confers the authority to make such nomination. If none of the foregoing persons qualifies or if the clerk of superior court upon hearing finds that none of the foregoing persons is qualified in accordance with G.S. 28A-4-2, the clerk shall grant letters of administration in accordance with subsection (b).

(b) Letters of Administration. — Letters of administration shall be granted to persons who are qualified to serve, in the following order, unless the clerk of superior court in his discretion determines that the best interests of the estate otherwise require:

(1) The surviving spouse of the decedent;
(2) Any devisee of the testator;
(3) Any heir of the decedent;
(3a) Any next of kin, with a person who is of a closer kinship as computed pursuant to G.S. 104A-1 having priority;
(4) Any creditor to whom the decedent became obligated prior to his death;
(5) Any person of good character residing in the county who applies therefor; and
(6) Any other person of good character not disqualified under G.S. 28A-4-2.

When applicants are equally entitled, letters shall be granted to the applicant who, in the judgment of the clerk of superior court, is most likely to administer the estate advantageously, or they may be granted to any two or more of such applicants. (R.C., c. 46, ss. 2, 3; C.C.P., s. 456; 1968-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C.S., s. 6; 1949, c. 22; 1973, c. 1329, s. 3; 1987, c. 357.)

CASE NOTES

III. Letters of Administration.

III. LETTERS OF ADMINISTRATION.

Next of Kin. —

For purposes of this section, "next of kin" refers to the class of blood relatives of the decedent; thus, the court erred in determining that the term was synonymous with "heirs," as used in § 41-6.1. In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

Applied in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under subdivision (4) of this section because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

Applied in Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

ARTICLE 5.

Renunciation by Personal Representative.

§ 28A-5-2. Renunciation of right to administer.

CASE NOTES

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-2. Letters issued without notice; exceptions.

CASE NOTES

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. General Consideration.
III. Default or Misconduct.

I. GENERAL CONSIDERATION.

Section 1A-1, Rule 58 Inapplicable to Denial of Motion to Revoke. — Section 1A-1, Rule 58 has no application in case involving the denial of a motion made before the clerk of superior court pursuant to this section to revoke the letters testamentary of executor. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Proceeding to remove an executor and a civil suit for damages are not the same cause of action. The proceeding to remove an executor is purely statutory, with probate jurisdiction vested in the clerk of superior court, and reviewable by a superior court judge on appeal. A civil suit for damages involves a full trial with the right to have factual issues resolved by a jury. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Statutory action to remove administrators or executors is not res judicata in any other proceeding which the parties are entitled to pursue. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

A proceeding under this section is not res judicata in a civil action for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Orders entered in a proceeding under this section, in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Beneficiaries Seeking Removal Not Held to Election of Remedies. — Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Denial of Motion to Revoke "Entered" When Clerk Announced After Hearing He Would Deny It. — Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing that he would deny the petition. The party aggrieved by the ruling, the petitioner, was present and even excepted to the order, had ten days thereafter to give notice of appeal pursuant to § 1-272. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Verification Sufficient. — Signing of petition for revocation before a notary public under oath, petitioner having sworn that the matters stated in the petition upon her information and belief were true, constituted sufficient verification required by this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

"Special Proceeding." — The procedure for the revocation of the letters testamentary of an administratrix as set forth in this section is a "special proceeding," and the clerk had statutory authority to appoint the guardian ad litem. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

The minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under this section to appeal the decision of the clerk on the revocation issue. This was sufficient to bring the matter within the purview of Rule 17 providing it was an "action or special proceeding." In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Quoted in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

III. DEFAULT OR MISCONDUCT.

Executor's acceptance of commissions based on an erroneous interpretation of a statute would not be misconduct requiring revocation of letters testamentary. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Allegations of Misconduct Held Sufficient. — Allegations that coexecutor failed to timely file estate accountings with the clerk's office, disregarding notices issued by the clerk that such accountings were due, that he paid himself approximately $32,900 from the estate for his commission and attorneys' fees without approval of the clerk and that this amount was in excess of any amount which he could legally be allowed for commissions and legal fees, and that through his default and misconduct he had violated his fiduciary duty as a coexecutor of the estate constituted sufficient grounds upon which executrix could petition for the revocation of coexecutor's letters under subdivision (a)(3) of this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

ARTICLE 11.

Collectors.

§ 28A-11-3. Duties and powers of collectors.

CASE NOTES

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-1. Time of accrual of duties and powers.

CASE NOTES

Testamentary directions for disposition of the testator's body must be treated as valid upon the death of the testator, and funeral directors who act upon the provision in good faith cannot later be held liable in tort because they acted before the will was probated. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

A testamentary provision directing disposition of the testator's body must prevail over conflicting wishes of the testator's next-of-kin and the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and therefore they have no standing to sue for negligence for failure to carry out their instructions for disposal of testator's body. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

Cited in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36A-63.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy, and to execute waivers, consents or objections with respect to such stock or securities.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102.

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not. Unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing, any

such settlement shall be subject to the approval of a judge of the court or tribunal exercising jurisdiction over the action or a judge of the district or superior court in cases where no action has previously been filed. If the claim is brought under Article 31 of Chapter 143 of the General Statutes, the settlement is subject to the approval of the Industrial Commission in accordance with that Article. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(a1) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a1) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

(1) A description of the real property which is the subject of the petition;
(2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;
(3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an order authorizing that power. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C.S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3; 1985, c. 689, s. 8; 1991, c. 460, s. 3; 1995, c. 401, s. 1; 1997-181, s. 22.)

Local Modification. — City of Winston-Salem: 1995, c. 112, s. 1.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and not affecting actions or proceedings commenced before that date, substituted "G.S. 25-8-102" for "G.S. 25-8-102(3)" in subdivision (a)(10)b.

CASE NOTES

Prior Settlement and Approval of Attorneys' Fees Not Bar to Malpractice Suit. — Settlement and approval of attorneys' fees in previous wrongful death action was not a bar to suit for attorney malpractice alleging negligence and breach of fiduciary duty; collateral estoppel was not applicable so as to support summary judgment in favor of defendants. Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990).

Personal representative has the authority, in accomplishing the expeditious settlement of a decedent's estate, to settle and compromise claims in favor of or against the estate, provided that he acts honestly, reasonably and prudently. Hunter v. Newsom, 121 N.C. App. 564, 468 S.E.2d 802 (1996).

In the determination of whether a deed of trust conveyed by the executor is a debt of the estate, the burden is on the party asserting the validity of the debt as an obligation of the estate to show that the executor acted within his authority as executor. Hunter v. Newsom, 121 N.C. App. 564, 468 S.E.2d 802 (1996).

Quoted in Farm Credit Bank v. Edwards, 121 N.C. App. 72, 464 S.E.2d 305 (1995).

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

Cited in Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990); Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990); Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

(a) As used in this section, the term "personal representatives" includes testamentary trustees.

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

(1) Open bank accounts and draw checks thereon;
(2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
(3) Employ attorneys and accountants;
(4) List property for taxes and prepare and file State, municipal and county tax returns;
(5) Collect claims and debts due the estate and give receipts therefor;
(6) Pay claims against and debts of the estate;
(7) Compromise claims in favor of or against the estate;
(8) Have custody of property of the estate.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;
(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
(3) If one or more vote, in person or by proxy, but the vote is evenly split on any particular matter, each fraction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which he joins at the direction of the majority of the personal representatives, if he expressed his dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1959, c. 1160; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1991, c. 460, s. 1.)

§ 28A-13-10. Liability of personal representative.

CASE NOTES

Liability for Depreciation of Assets. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

(a) Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least three months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish or mail notice to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. When any collector or personal representative of an estate has published or mailed the notice provided for by this section, no further publication or mailing shall be required by any other collector or personal representative.

(b) Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 75 days after the granting of letters. Provided, however, no notice shall be required to be delivered or mailed with respect to any claim that is recognized as a valid claim by the personal representative or collector.

(c) The personal representative or collector may personally deliver or mail by first class mail a copy of the notice required by subsection (a) of this section to all creditors of the estate whose names and addresses can be ascertained with reasonable diligence. If the personal representative or collector in good faith believes that the notice required by subsection (b) of this section to a particular creditor is or may be required and gives notice based on that belief, the personal representative or collector is not liable to any person for giving the notice, whether or not the notice is actually required by subsection (b) of this section. If the personal representative or collector in good faith fails to give notice required by subsection (b) of this section, the personal representative or collector is not liable to any person for such failure. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C.S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 319; 1987 (Reg. Sess., 1988), c. 1077, s. 1; 1989, c. 378, s. 1; c. 770, s. 8; 1991, c. 282, s. 1.)

Legal Periodicals. — For article, "Notice to Creditors in Estate Proceedings: What Process Is Due?", see 63 N.C.L. Rev. 659 (1985).

CASE NOTES

Claims Against the Estate for Decedent's Fraud Barred. — Where plaintiff's claims were based on fraud, and one participant in the fraud was dead, two statutes were applicable to their action, § 1-52(9) requiring a claim be filed within three years of the discovery of the fraud, and this section requiring that a claim be filed within six months after the personal representative of the decedent first published the notice to creditors. Since this section more specifically deals with when a claim may be filed against an estate, this statute controlled, and would bar a cause of action even if the action had been filed within three years of discovery. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

For the purpose of the discovery rule delaying the running of a limitation period, a subtle yet distinct difference in meaning between the words "arise" and "accrue" becomes evident: a cause of action for fraud accrues when the fraud is discovered. Because a participant in fraud died more than four years before action was filed, any alleged fraud committed by him must have arisen more than four years earlier, during his lifetime, and the North Carolina non-claim statute barred any claims filed more than six months after final creditor's notice, though sounding in fraud. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-14-1.1. Validation of certain notices.

(a) Any notice to creditors published or posted under G.S. 28A-14-1 which did not, in the advertisement, name the day after which claims could not be presented is validated.

(b) This section applies to all notices published and posted between October 1, 1975, and January 1, 1991, except that it does not affect any pending litigation or any litigation instituted within 90 days of January 1, 1991. (1981, c. 96, ss. 1, 2; 1987, c. 277, s. 8; 1989, c. 390, s. 8; 1991, c. 489, s. 8.)

Editor's Note. — Session Laws 1987, c. 277, which amended this section, in s. 11 provided: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 28A-14-2. Proof of notice.

A copy of the notice directed by G.S. 28A-14-1(a) to be posted or published, together with an affidavit or affidavits of one of the persons authorized by G.S. 1-600(a) to make affidavits to the effect that such notice was posted or published in accordance with G.S. 28A-14-1(a), and an affidavit of the personal representative or collector, or the attorney for the personal representative or collector, to the effect that a copy of the notice was personally delivered or mailed to each creditor entitled to notice in accordance with G.S. 28A-14-1(b) shall be filed in the office of the clerk of superior court by the personal representative or collector at the time the inventory required by G.S. 28A-20-1 is filed. The copy of the notice, together with the affidavit or affidavits, shall be deemed a record of the court and a copy thereof, duly certified by the clerk of superior court, shall be received as prima facie evidence of the fact of publication or mailing in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C.S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2; 1973, c. 1329, s. 3; 1987 (Reg. Sess., 1988), c. 1077, s. 2; 1989, c. 378, s. 2.)

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

(a) All of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property. Provided that before real property is selected the personal representative must determine that such selection is in the best interest of the administration of the estate.

(b) In determining what property of the estate shall be sold, leased, pledged, mortgaged or exchanged for the payment of the debts of the decedent and other claims against his estate, the personal representative shall select the assets which in his judgment are calculated to promote the best interests of the estate. In the selection of assets for this purpose, there shall be no necessary distinction between real and personal property, absent any contrary provision in the will.

(c) If it shall be determined by the personal representative that it is in the best interest of the administration of the estate to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court for such purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required for a sale made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.

(d) The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the personal representative or collector, as part of the personal assets of the decedent's estate; and shall not pass to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (1868-9, c. 113, ss. 14, 15; Code, ss. 1406, 1407; Rev., ss. 45, 47; C.S., ss. 52, 54; 1973, c. 1329, s. 3; 1975, c. 300, s. 5; 1985, c. 426.)

CASE NOTES

In the determination of whether a deed of trust conveyed by the executor is a debt of the estate, the burden is on the party asserting the validity of the debt as an obligation of the estate to show that the executor acted within his authority as executor. Hunter v. Newsom, 121 N.C. App. 564, 468 S.E.2d 802 (1996).

Ownership of Note upon Death of Joint Payee. — Promissory note payable only to testator and his wife did not become part of testator's estate but became the sole property of testator's wife upon his death; therefore, son would not inherit. Miller v. Miller, 117 N.C. App. 71, 450 S.E.2d 15 (1994).

Quoted in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988); Chamblee v. Espy, 100 F.3d 15 (4th Cir. 1996).

§ 28A-15-2. Title and possession of property.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Stated in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Bequest Not Adeemed by Sale During Testator's Incompetency. — Where the trial court found that testator specifically bequeathed his interest in livestock to his daughter, and subsequently became incompetent and did not regain his competency at any time before his death, and where his interest in livestock was sold by his trustees for $22,543.48, and those funds were included in the assets coming into the hands of the executor, and moreover, where there were sufficient assets in the estate to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises, these findings were sufficient to support the court's conclusion that testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by the trustee's sale thereof during testator's incompetency before his death. In re Estate of Warren, 81 N.C. App. 634, 344 S.E.2d 795 (1986).

Applied in Creekmore v. Creekmore, — N.C. App. —, 485 S.E.2d 68 (1997).

§ 28A-15-6. Federal income tax refunds — joint returns.

CASE NOTES

Applied in Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

§ 28A-15-9. Excess funds.

CASE NOTES

Applied in Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

§ 28A-15-10. Assets of decedent's estate for limited purposes.

CASE NOTES

Cited in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

§ 28A-15-12. Examination of persons or corporations believed to have possession of property of decedent.

CASE NOTES

Attorneys' fees were recoverable by administrators of decedent's estate, as successful parties, in suit by administrators to compel decedent's son to provide an accounting of certain estate property. In re Estate of Katsos, 84 N.C. App. 682, 353 S.E.2d 677, cert. denied, 320 N.C. 169, 358 S.E.2d 52 (1987).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

I. General Consideration.
II. Practice and Procedure.

I. GENERAL CONSIDERATION.

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

II. PRACTICE AND PROCEDURE.

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

§ 28A-17-4. Heirs and devisees necessary parties.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.
II. Revival and Survival of Actions.

I. GENERAL CONSIDERATION.

This section clearly manifests, etc. —

In accord with the main volume. See Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Limitation for Wrongful Death Action Based on Medical Malpractice Not Extended by § 1-15(c). — Section 1-15(c) would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to § 1-53(4). King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812, cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

A viable fetus is a "person" under the Wrongful Death Act and the estate of such a person may bring an action for damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Applied in McGowen v. Rental Tool Co., 109 N.C. App. 688, 428 S.E.2d 275 (1993).

Cited in Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994); Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994); Jones v. Rochelle, 125 N.C. App. 82, 479 S.E.2d 231 (1996).

II. REVIVAL AND SURVIVAL OF ACTIONS.

Civil Action Based Upon Personal Injuries. — This section provides that a civil action based upon personal injuries survives the death of the plaintiff. Schronce v. Coniglio, 124 N.C. App. 216, 476 S.E.2d 366 (1996).

Action for Divorce Did Not Survive Husband's Death. — Trial court did not err in dismissing husband's action for divorce and wife's counterclaim for equitable distribution where husband died before decree of absolute divorce was granted. Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271, cert. denied, 325 N.C. 270, 384 S.E.2d 513 (1989).

Action Under Tort Claims Act. — Recovery against the county board of education pursuant to the North Carolina Tort Claims Act did not bar plaintiff's claims against the individual bus driver who caused the wreck, or plaintiff's uninsured motorist/underinsured motorist (UM/UIM) carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act. Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars ($4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees, but shall be disposed of as provided in the Intestate Succession Act. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1. (R.C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C.S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468; 1985, c. 625; 1993, c. 299, s. 1; 1995, c. 514, s. 2; 1997-456, s. 7.)

Editor's Note. — Session Laws 1995, c. 514, s. 4, is a severability clause.

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to claims for relief arising on or after that date, in subdivision (b)(5) added "pursuant to Chapter 1D of the General Statutes", and substituted "malice or willful or wanton conduct, as defined in G.S. 1D-5" for "maliciousness, wilful or wanton injury, or gross negligence".

The 1997 amendment, effective August 29, 1997, in subsection (a) added "but shall be disposed of as provided in the Intestate Succession Act" at the end of the second to last sentence, deleted "but shall be disposed of as provided in the Intestate Succession Act" preceding "time" at the end of the last sentence, and made minor punctuation changes.

Legal Periodicals. —

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For article, "Economic Valuation for Wrongful Death," see 6 Campbell L. Rev. 47 (1984).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For comment, "Wrong Without a Remedy—North Carolina and the Wrongful

Death of a Stillborn," see 9 Campbell L. Rev. 93 (1986).

For note discussing the appointment of an administrator for a decedent's estate to create diversity of citizenship, see 21 Wake Forest L. Rev. 489 (1986).

For note discussing wrongful death recovery for a viable unborn fetus, in light of DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986), see 16 N.C. Cent. L.J. 207 (1987).

For note on the wrongful death of a viable fetus in North Carolina, see 66 N.C.L. Rev. 1291 (1988).

For note on the expansion of the viable fetus wrongful death action, see 11 Campbell L. Rev. 91 (1988).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

For note, "Examining DiDonato Damage Limitation and Mandatory Joinder Requirements — Greer v. Parsons," see 15 Campbell L. Rev. 97 (1992).

For article, "Person or Thing — In Search of the Legal Status of a Fetus: A Survey of North Carolina Law," see 17 Campbell L. Rev. 169 (1995).

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I. GENERAL CONSIDERATION.

Editor's Note. *— Most of the cases below were decided prior to the 1993 amendment, which raised to $4,500 the limit on the amount recovered in a wrongful death action that is liable for the payment of hospital and medical expenses of the decedent.*

Annotations in the main volume under analysis line I, "General Consideration," and catchlined "Person in former § 28-173, etc." and "For case calling for legislative action, etc." should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

Preemption. — Where decedent was killed in automobile accident, Employee Retirement Income Security Act (ERISA) preempted the operation of North Carolina's wrongful death statute to the extent that the state law precluded operation of the terms of the "Acts of Third Parties" clause in the plan requiring reimbursement to plan. McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

Application of Section to Actions Pursuant to 42 U.S.C. § 1983. — There is no federal statutory law governing the measure of damages in wrongful death actions brought pursuant to 42 USC § 1983, and, therefore, 42 USC § 1988 compels the use of the law of North Carolina: namely, this section. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

The North Carolina wrongful death statute satisfies the two underlying policies of 42 U.S.C. § 1983, as it provides adequate relief for the estate of the deceased, and satisfies the policy of preventing abuses of power by state officials by the availability of punitive damages. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

Municipalities Not Exempt from Section. — The plain, positive provisions of this section contain no basis for supposing that the Legislature intended to exempt municipalities therefrom. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Section Encompasses Loss of Consortium Claims. — The trial court properly dismissed plaintiff's claim brought in her individual capacity for loss of consortium based on the ground that the wrongful death statute encompasses loss of consortium claims, and any common law claim encompassed by the wrongful death statute should have been asserted under this section by the personal representative for the deceased. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

The tort claim for "loss of consortium", no matter what damages may be recovered thereunder, is covered under the wrongful death statute, and plaintiff could not, therefore, bring an independent claim for loss of consortium in her action asserting a claim for wrongful death. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

Negligence Per Se. — Trial court did not err in admitting testimony that decedent did not have motorcycle endorsement at time of accident. Violation of § 20-7 is negligence per se. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Gross negligence is "something less than willful and wanton conduct," and includes "the absence of even slight care," "indifference to the rights and welfare of others," "negligence of an aggravated character." Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993).

Child Not a "Trespasser." — Child who was electrocuted when he entered power company's cabinet containing high voltage wires located on property on which the company had an easement, who had permission of the landowners to play on the property, was not a trespasser as that term has been defined by our case law, and thus the power company was not entitled to have its legal duty reduced. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Joinder of Action for Wrongful Death of Viable Fetus. — The action for wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Lack of Administrator for Fetus's Estate Not Grounds for Dismissal Where Clerk Unwilling to Issue Letters of Administration. — Cause of action for the wrongful death of the fetus was not subject to dismissal on grounds that it was not brought by the personal representative of the deceased as required by subsection (a), where the failure to bring this action in the name of the administrator of the estate was apparently due to the unwillingness of the clerk of court to issue letters of administration for a fetus's "estate." The existence of a cause of action for wrongful death is sufficient for the appointment of an administrator, and since a wrongful death action exists for a viable fetus, the clerk should have appointed an administrator to bring the action. Ledford v. Martin, 87 N.C. App. 279, 359 S.E.2d 505 (1987), cert. denied, 321 N.C. 473, 365 S.E.2d 1 (1988), overruled on other grounds, Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85 (1990).

If an employee's action would be barred by the Workers' Compensation Act, then a wrongful death action brought by the employee's representative is also barred. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Complaint Barred by Workers' Compensation Act. — Wrongful death complaint alleging that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death, came within the language of § 97-53(13) and was barred by the Workers' Compensation Act. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Claim Against Provider of Alcohol Barred by Decedent's Negligence. — Plaintiff's wrongful death claim against a provider of alcohol alleging wilful and wanton negligence for serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him was barred by the decedent's own actions in driving his vehicle while highly intoxicated. Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 423 S.E.2d 72 (1992).

Action Not Maintained Since Children Could Not Have Recovered For Injuries If They Had Lived. — The cause of action for the children's wrongful death, where the children were killed by their mother and her boyfriend as they were fleeing from police shortly before the truck they were in was blown up during the course of a gun battle and high speed chase with police, could not be maintained because the children could not have recovered for their injuries if they had lived, and the first requisite of a wrongful death action in this State is that the decedent could have recovered for his injuries if he had lived. Lynch v. North Carolina Dep't of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989).

Action Against Pharmacist. — While a pharmacist has no duty to advise absent knowledge of the circumstances, once a pharmacist is alerted to specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly; therefore, where plaintiff alleged, among other things, that her decedent "sought out and was relying upon the skill, judgment and expertise of defendant with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition," she stated a claim upon which relief could be granted. Ferguson v. Williams, 92 N.C. App. 336, 374 S.E.2d 438 (1988).

Payment of Expenses of Suit from Assets of Estates. — With the 1985 amendment of subsection (a) of this section, the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Prior to the 1985 amendment to subsection (a) of this section, there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on February 1, 1985, clerk properly denied petition seeking authorization of payment of litigation expenses out of decedent's estate, and superior court was correct in affirming the clerk's order. However, following the July 5, 1985 amendment there was nothing to prevent decedent's personal representatives from filing a new petition seeking to have those same expenses paid from the deceased's estate. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Contributory negligence of decedent, who was operating his vehicle in an impaired condition in violation of § 20-138.1, was a defense to a wrongful death claim under this section based on defendants' alleged negligence in selling alcohol to an intoxicated person. Clark v. Inn W., 89 N.C. App. 275, 365 S.E.2d 682, rev'd on other grounds, 324 N.C. App. 415, 379 S.E.2d 23 (1989).

Effect of Medicare. — The Wrongful Death Act's $1,500 limitation on a health care provider's right to recover a decedent's medical expenses is preempted by Medicare's secondary payer provisions. Cox v. Shalala, 112 F.3d 151 (4th Cir. 1997).

Applied in Williams v. Odell, 90 N.C. App. 699, 370 S.E.2d 62 (1988); Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Stated in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

Cited in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); In re Ragan, 64 Bankr. 384 (Bankr. E.D.N.C. 1986); Woodson v. Rowland, 92 N.C. App. 38, 373 S.E.2d 674 (1988); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Doe v. American Nat'l Red Cross, 837 F. Supp. 121 (E.D.N.C. 1992).

III. PARTIES TO THE ACTION.

Editor's Note. — *Annotations in the main volume under analysis line III, "Parties to the Action," and catchlined "Prenatal Death of Viable Child," should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Nor parent for death of child. —

Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Prenatal Death of Viable Child. — This section allows recovery for the death of a viable but unborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

The Supreme Court's holding in

DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), permitting an action to recover for the destruction of a viable fetus en ventre sa mere, could be applied retroactively to an action commenced before DiDonato was decided. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

The definition of "viability" intended by the Supreme Court in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), is simply the common law definition of fetal capability to live independently of the mother. Although there is apparently no clear medical consensus as to the specific gestational age at which this capability is currently achieved, a gestational range of 20 to 26 weeks has been suggested. However, the determination of a fetus's viability is a question of fact. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

A wrongful death action may be maintained against a municipal corporation. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

Actions Against County Employees. — Plaintiff's complaint, claiming that social services employees defendants' negligent failure to investigate claims of child abuse and neglect, coupled with their failure to remove her son from the custody of his abusive father caused her son's death, contained allegations pertaining only to the defendants' actions or inactions in their official capacities with county department of social services and that defendants were entitled to judgment based on governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

IV. DISTRIBUTION OF RECOVERY.

Editor's Note. — *The annotations to the case of Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969), appearing under this analysis line on pages 87 to 89 of the main volume, should be disregarded.*

Attorneys' Fees. — The 1985 amendment to this section provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

Attorney who neither initiated nor handled wrongful death claim and was appointed successor administrator only after wrongful death award had been made, but who expended considerable time in determining the correct distribution of wrongful death proceeds, could be compensated for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

"Costs" of an estate would not be payable from wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

V. DAMAGES RECOVERABLE.

A. In General.

Editor's Note. — *The annotation in the main volume under analysis line V A, "Damages Recoverable, In General," and catchlined "Prenatal Death of Viable Child," should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Basis for Damages Generally. — This section allows the personal representative, on behalf of the statutory beneficiaries of the estate, to recover, inter alia, the present monetary value of the decedent to the beneficiaries. The measure is the worth of the decedent; how well off the beneficiaries are absent the decedent is immaterial. Harris v. United States, 121 F.R.D. 652 (W.D.N.C. 1988).

Question as to Economic Loss to Estate Not Error. — Where plaintiff's lawyer asked doctor "Do you have an opinion as to the present value of the economic loss to the estate?", defendant was correct in pointing out that recovery of damages under the statute is to the beneficiaries of the decedent and not to the decedent's estate; however, it was plain from the record that both doctor and the jury understood the correct measurement of damages under the wrongful death statute. Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

Negative Factors Held Relevant to Present Monetary Value. — Evidence regarding 19 year old decedent's low level of educational attainment, absence of regular employment, status of dependency on her parents, and history of alcohol and drug abuse was clearly relevant to a determination of her "present monetary value ... to the persons entitled to receive the damages recovered," and the jury could conclude that these negative factors offset, to the extent found, what decedent's present monetary value would have been in their absence.

Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985), upholding award of damages in the amount of $5,000.

Under Subsection (b)(4), only reasonably expected net income of decedent can be recovered. Victim's parents, his only survivors, could only recover the amount of his income that they reasonably might have received had he lived. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Trial Court Erred in Application of This Section. — Although the trial court properly used the wrongful death statute to compute the amount of restitution which defendant found guilty of misdemeanor death by vehicle should pay, it erred in its application of this section. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Certain increased medical expenses as well as funeral bills incident to the death of a 40 week-old fetus could only be recovered by the administrator of the fetal estate pursuant to an action under this section. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Hedonic damages are not recoverable under subdivision (b) of this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Trial Court Should Submit to Jury Separate Issues for Compensatory and Punitive Damages. — In wrongful death action, trial court should submit to jury separate issues for compensatory and punitive damages when evidence supports submission of these issues. Jones v. McCaskill, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

Double Recovery Not Permitted. — Because recovery for any diminishment in the quality of life of the survivors in a wrongful death case is already addressed in effect under subdivisions (b)(4)b and (b)(4)c, allowance of separate hedonic damages would result in double recovery. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Relevant Evidence. — Evidence pertaining to disease of plaintiff's decedent and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which were in controversy in wrongful death action. The evidence was therefore relevant and should have been admitted on that ground. Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

B. Pain and Suffering.

However, Decedent Must Have Been Conscious. — In an action under the Federal Tort Claims Act arising out of a vehicular accident, the extent of the accident inflicted massive head injuries making it improbable that the decedent was conscious following the collision, and therefore ruling out recovery for post-accident pain and suffering. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

C. Burial Expenses.

Prenatal Death of Viable Child. — Medical and funeral expenses, as well as punitive and nominal damages, should be allowed in the case of a decedent fetus where appropriate. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

D. Loss of Decedent's Income, Services, Society, etc.

Prenatal Death of Viable Child. — Lost income damages normally available under subdivision (b)(4)a cannot be recovered in an action for the wrongful death of a stillborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Damages normally recovered under subdivision (b)(4)b and c, for loss of services, companionship, advice and the like, will not be available in an action for the wrongful death of a viable fetus. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Loss of bloodline and denial of grandchildren are not grounds for recovery under this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Showing of Actual Support of Parents Not Required. — Trial judge did not err by instructing the jury that it could award damages to decedent's parents for the loss of her net income; there is no reason to demand actual support of the parents as the sole ground for any recovery of lost income since such a requirement would run counter to the remedial purpose of the statute and to the evidentiary provisions of subsection (c). Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

E. Punitive Damages.

Three Categories of Conduct Affording Recovery. — By providing for recovery of punitive damages upon a showing of "maliciousness, wilful or wanton injury, or gross negligence" it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Recovery for Gross Negligence Even Absent Wilful or Wanton Conduct. — This section allows recovery of punitive damages in wrongful death actions involving gross negligence even when no wilful or wanton conduct was involved. To establish gross negligence, the plaintiff must show negligence of an aggravated character. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142 (1991).

Gross Negligence, etc. —

In accord with second paragraph in the main volume. See Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort-feasors. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Recovery from Municipal Corporations. — This section, the North Carolina Wrongful Death Act, contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

When Directed Verdict Proper as to Claim for Punitive Damages. — In a wrongful death action arising out of negligence, a directed verdict may properly be granted against a plaintiff seeking punitive damages only where the evidence is insufficient as a matter of law to support a jury finding that the defendant wrongfully caused the death of the decedent in a malicious, wilful, wanton or grossly negligent manner. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Evidence Sufficient to Support Award of Punitive Damages. — Evidence of truck driver's driving record was sufficient for jury to find that trucker was an unsafe driver, that company for which he worked either knew or should have known of his danger to the rest of the driving public, and given the number and severity of his offense, was equally sufficient to support the jury's finding that company's negligent entrustment was wilful or wanton, so as to justify denial of defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of company's negligent entrustment. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Personal Representative's Claim Not Barred for Failure to Join with Parents. — Administratrix's claim for punitive damages for death of stillborn child was not barred merely because it was not joined with the settled claim of the parents; if defendants wished to allege that part of the moneys the parents received in settlement of their claims was for punitive damages, defendants would have a right to support that contention with evidence and have the jury consider it in evaluating the administratrix's claim for punitive damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

F. Nominal Damages.

Nominal Damages Appropriate. — Where the jury found that plaintiff had been "damaged by the negligence of the defendant", that the plaintiff's intestate did not contribute to her own injuries, and that plaintiff established her cause of action for wrongful death, the trial court erred in refusing to enter an award of nominal damages. Porter v. Leneave, 119 N.C. App. 343, 458 S.E.2d 513 (1995).

VI. ADMISSION OF DYING DECLARATIONS.

Cited in Jones v. Rochelle, 125 N.C. App. 82, 479 S.E.2d 231 (1996).

§ 28A-18-3. To sue or defend in representative capacity.

CASE NOTES

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims.

(a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

(1) By delivery in person or by mail to the personal representative, collector or clerk of superior court. Such claim will be deemed to have been presented from the time of such delivery.

(2) By mailing, registered or certified mail, return receipt requested, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent.

(3) By delivery to the clerk of court of the county in which the estate is pending, which notice shall be filed in the appropriate estate file and copy mailed first class by the clerk of superior court at the expense of the claimant to the personal representative, collector, or his agent. The claim will be deemed to have been presented from the time of delivery to the clerk of court.

(b) In an action commenced after the death of the decedent against his personal representative or collector as such, the commencement of the action in the court in which such personal representative or collector qualified will constitute the presentation of a claim and no further presentation is necessary. In an action filed in any other court such claim will be deemed to have been presented at the time of the completion of service of process on such personal representative or collector.

(c) In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative or collector for the decedent or motion therefor will constitute the presentation of a claim and no further presentation is necessary. Such claim will be deemed to have been presented from the time of the substitution, or motion therefor. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 645, s. 1.)

CASE NOTES

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt this section and § 28A-19-3 in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993), aff'd, 83 F.3d 415 (4th Cir. 1996).

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

§ 28A-19-3. Limitations on presentation of claims.

(a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. Provided further, if the expiration of said 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to each creditor, if any, shall be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, except claims of the United States and tax claims of the State of North Carolina and subdivisions thereof whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

(1) With respect to any claim based on a contract with the personal representative or collector, within six months after the date on which performance by the personal representative or collector is due;

(2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

(c) Except as otherwise provided by subsection (f) of this section, no claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

(d) All claims of creditors upon whom there has been personal service of notice as provided in G.S. 28A-14-3 are forever barred unless presented to the personal representative or collector within the time and manner set out in this Article.

(e) Except as otherwise provided by subsection (f) of this section, unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 within the time provided by subsection (a) of this section, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(f) All claims barrable under the provisions of subsections (a) and (b) hereof shall, in any event, be barred if the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within three years after the death of the decedent.

(g) Nothing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with.

(h) The word "claim" as used in this section does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees.

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; or
(2) Any proceeding or action to establish the liability of the decedent or personal representative; or
(3) The recovery on any judgment against the decedent or personal representative

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1979, c. 509, s. 1; 1989, c. 378, s. 3; c. 485, s. 65.)

Editor's Note. —

Session Laws 1989, c. 485, s. 67, is a severability clause.

Legal Periodicals. —

For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

CASE NOTES

Purpose. — This section is the type of statute that is commonly referred to as a "non-claim statute" and although similar to a statute of limitations, it serves a different purpose and operates independently of the statute of limitations that may also be applicable to a given claim. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Limitations on the filing of an action are applicable to statutes of limitations which restrict the assertion of legal rights to a specific time period in order to avoid stale claims, and a cause of action may be barred by this section, § 1-52(5), or both of these statutes. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt § 28A-19-1 and this section in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993), aff'd, 83 F.3d 415 (4th Cir. 1996).

Filing of Claim in Court Not Required. — Section 28A-19-1 sets out the manner of presentation of claims including some circumstances under which the filing of an action in a court of law may constitute the presentation of a claim; however, this section does not require the filing of an action in a court of law. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Language of subsection (i) provides an exception to limitations only for claims where there is insurance under which a decedent was insured. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Recovery Limited After Six Months. — Automobile accident victim who filed suit more than six months after the accident was limited in his amount of recovery by the amount of the deceased defendant's automobile insurance. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Claim Not Barred Where Personal Representative Was Not Appointed. — Plaintiffs' cause of action is not barred for failure to present the claim to the personal representative within the time prescribed by subsection (b) where no personal representative or collector had been appointed for the estate. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Under Subsection (i) Plaintiff Barred from Claim Greater Than Underinsurance Coverage. — Where, pursuant to subsection (i) of this section, all that plaintiff could recover from the underinsured decedent was the $25,000.00 coverage the decedent had under his policy with insurer, plaintiff, who was only legally entitled, by statute, to recover this amount, and nothing more, from decedent could not bring a claim for a greater amount against insurer under his underinsured motorist endorsement. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Claim for Compensation for Occupation of Property Not Barred Where Presented Within Period Under Section. — A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period under this section and was therefor not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Reopening of Estate After Six-Month Period. — The provision in § 28A-23-5 prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in this section on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Applied in Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984); Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991); State Farm Mut. Auto. Ins. Co. v. Blackwelder, 332 N.C. 135, 418 S.E.2d 229 (1992).

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-19-5. Contingent claims.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-6. Order of payment of claims.

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C.S., s. 93; 1941, c. 271; 1955, c. 641, s. 1; 1967, c. 1066; 1973, c. 1329, s. 3; 1981, c. 383, ss. 1, 2; 1987, c. 286; 1995, c. 262, s. 8.)

Editor's Note. —
Session Laws 1995, c. 262, s. 8, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

§ 28A-19-8. Funeral expenses of decedent.

CASE NOTES

Section Does Not Limit Collection of Expenses Exclusively to an Estate. — This section does not limit collection of funeral expenses exclusively to the estate. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Other Person's Promise to Pay Funeral Expenses. — Defendant's alleged promise to pay funeral expenses for his deceased father if the estate did not was a promise to pay the debt of another, which is void by law unless in writing. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991), holding, however, that as defendants did not specifically plead the statute of frauds, it was not available as a defense.

§ 28A-19-12. Claims due representative not preferred.

CASE NOTES

Attorneys' Fees and Commissions. — This section does not apply to the payment of attorneys' fees and commissions. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Claims by Personal Representative. — This section applies to "claims" against the estate, such as liens against property, funeral expenses, taxes, and judgments, where the claimant also happens to be the personal representative of the estate. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-19-15. Disputed claim may be referred.

CASE NOTES

Agreement to Refer Lacking. — Where the executor's letter to claimant merely stated that he "would suggest" that claimant "file a notice of hearing with the Clerk of Court" the language did not show that there was any agreement to refer the matter. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994), cert. denied, 336 N.C. 606, 447 S.E.2d 397 (1994).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

This statute provides the only procedure for the resolution of a rejected claim. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994), cert. denied, 336 N.C. 606, 447 S.E.2d 397 (1994).

This section applies to creditors' claims against an estate and not to the interests of heirs. The cases construing this Article involve actions by creditors to recover debts. Moreover, § 28A-19-3(h) expressly provides that the word "claim" as used in this Article "does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees." Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Three Calendar Months Not Equal to 90 Days. — Plaintiff had three calendar months, not 90 days, in which to file an action, thus the trial court erred in dismissing plaintiff's cause of action based on the statute of limitations. Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

Cited in Blalock v. Dandelake, 90 N.C. App. 461, 368 S.E.2d 891 (1988).

ARTICLE 21.

Accounting.

§ 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, for so long as any of the property of the estate remains in his control, custody or possession, file annually in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year. Such accounts shall be due by the fifteenth day of the fourth month after the close of the fiscal year selected by the personal representative or collector, and annually thereafter. The election of a fiscal year shall be made by the personal representative or collector upon filing of the first annual account. In no event may a personal representative or collector select a fiscal year-end which is more than twelve months from the date of death of a decedent or, in the case of trust administration, the date of the opening of the trust. Any fiscal year selected may not be changed without the permission of the clerk of superior court.

The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C.C.P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C.S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1981, c. 955, s. 1; 1987, c. 783, s. 1; 1991, c. 485, s. 1.)

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If no inheritance tax return was required to be filed for the estate under G.S. 105-23 because the estate met the requirements of subsection (b) of that section, the personal representative or collector shall so certify in the final account filed with the clerk of superior court. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(a)(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(b) Except as provided in subsection (a), after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, if all of the debts and other claims against the estate of the decedent duly presented and legally owing have been paid in the case of a solvent estate or satisfied pro rata according to applicable statutes in the case of an insolvent estate, the personal representative or collector may file his final account to be reviewed, audited and recorded by the clerk of superior court. Nothing in this subsection shall be construed as limiting the right of the surviving spouse or minor children to file for allowances under G.S. 30-15 through 30-18 and the right of a surviving spouse to file for property rights under G.S. 29-30. (C.C.P., s. 481; Code, s. 1402; Rev., s. 103; C.S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2; 1981 (Reg. Sess., 1982), c. 1221, s. 3; 1985, c. 82, s. 3; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 3; 1989, c. 770, s. 9.)

Editor's Note. —

Session Laws 1985, c. 656, which amended this section, provided in s. 55: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 provided that the act would not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as the franchise tax credit under § 105-120.2(d) (now repealed) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

§ 28A-21-4. Clerk may compel account.

CASE NOTES

Cited in In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804 (1985); Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

Article 22.

Distribution.

§ 28A-22-1. Scheme of distribution; testate and intestate estates.

CASE NOTES

Cited in Lee v. Barksdale, 83 N.C. App. 368, 350 S.E.2d 508 (1986).

§ 28A-22-5. Distribution of assets in kind in satisfaction of bequests and transfers in trust.

(a) Subject to the provisions of subsection (b) of this section, whenever under any will or trust indenture the executor, trustee or other fiduciary is required to, or has an option to, satisfy a bequest or transfer in trust by a transfer of assets of the estate or trust in kind at the values as finally determined for federal estate tax purposes, the executor, trustee or other fiduciary shall, in the absence of contrary provisions in such will or trust indenture, be required to satisfy such bequest or transfer by the distribution of assets fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of such bequest or transfer.

(b) The provisions of subsection (a) of this section shall not apply unless either:

(1) The decedent's surviving spouse is the beneficiary of the bequest or trust transfer described in subsection (a) of this section or of the residue of the estate or trust; or

(2) Any "skip person", as that term is defined in Chapter 13 of the Internal Revenue Code of 1986, as amended, is or may be a current or future beneficiary of the bequest or trust transfer described in subsection (a) of this section or of the residue of the estate or trust, and the value of the decedent's gross estate for federal tax purposes exceeds the value of the decedent's unused generation-skipping tax exemption available under Chapter 13 of the Internal Revenue Code of 1986, as amended. (1965, c. 764, s. 1; 1973, c. 1329, s. 3; 1995, c. 235, s. 5.)

Editor's Note. — Session Laws 1995, c. 235, s. 5, which amended this section, was effective October 1, 1995, and applicable to all distributions made on or after that date.

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-23-2. Payment into court of fund due minor.

When any personal representative or collector holds property due a minor without a guardian and desires to file his petition for settlement, he may deliver the property to the clerk of superior court who shall invest upon interest or otherwise manage said property for the use of the minor or the clerk may proceed to appoint a guardian for the minor pursuant to the provisions of Chapter 35A of the General Statutes and then may deliver the property of the minor to the guardian. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C.S., s. 153; 1965, c. 815, s. 3; 1973, c. 1329, s. 3; 1987, c. 550, s. 17.)

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

Editor's Note. — The reference in the historical citation to Session Laws 1959, c. 622 should be to Session Laws 1959, c. 662.

CASE NOTES

Purpose of Subsection (b). — Subsection (b) of this section ensures that the personal representative's commission on a sale of real estate is limited to the amount that was actually needed for the payment of claims. This discourages personal representatives from selling land merely to increase their commissions. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Discretion of Clerk. —

The allowance of a commission to an executor is a matter within the original jurisdiction of the clerk of the superior court and it is within his discretion to fix the amount, subject to the maximum provided by statute. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

An executor has no right to fix and determine compensation to be received by him. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

It is necessary for the executor to file a petition for commissions and fees along with the annual accountings to enable the clerk to determine the amount of the commission and attorneys' fees. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Payment of Commissions Held Proper. — Commissions to the executor of an estate could be paid on proceeds from the sale of real estate where the executor was required to sell the property under the terms of the will and the property was not sold to pay debts or legacies. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

CASE NOTES

Fees awarded under this section should be for actual services rendered and should not be based solely upon the size of the estate; nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

§ 28A-23-5. Reopening administration.

CASE NOTES

"Proper Cause" to Reopen. — The existence of a valid claim against an estate which is not time-barred may, in an appropriate case, constitute "proper cause" to reopen a closed estate in order to assert the claim. However, claims which are already barred may not be asserted in a reopened administration. Thus, without more, a claim which is barred by the statute of limitations may not constitute "proper cause" to reopen administration of a closed estate. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Reopening of Estate After Six-Month Period. — The provision in this section prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in § 28A-19-3 on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Estate Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

ARTICLE 25.

Small Estates.

§ 28A-25-1. Collection of property by affidavit when decedent dies intestate.

(a) When a decedent dies intestate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12- 1, or an heir or creditor of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir or creditor or the public administrator stating:

(1) The name and address of the affiant and the fact that he or she is the public administrator or an heir or creditor of the decedent;

(2) The name of the decedent and his residence at time of death;
(3) The date and place of death of the decedent;
(4) That 30 days have elapsed since the death of the decedent;
(5) That the value of all the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed ten thousand dollars ($10,000);
(6) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;
(7) The names and addresses of those persons who are entitled, under the provisions of the Intestate Succession Act, to the personal property of the decedent and their relationship, if any, to the decedent; and
(8) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

In those cases in which the affiant is the surviving spouse and sole heir of the decedent, not disqualified under G.S. 28A-4-2, the property described in this subsection that may be collected pursuant to this section may exceed ten thousand dollars ($10,000) in value but shall not exceed twenty thousand dollars ($20,000) in value. In such cases, the affidavit shall state: (i) the name and address of the affiant and the fact that he or she is the surviving spouse and is entitled, under the provisions of the Intestate Succession Act, to all of the property of the decedent; (ii) that the value of all of the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed twenty thousand dollars ($20,000); and (iii) the information required under subdivisions (2), (3), (4), (6), and (8) of this subsection.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy thereof shall be mailed by the clerk to the persons shown in the affidavit as entitled to the personal property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1973, c. 1329, s. 3; 1975, c. 300, s. 9; 1983, c. 65, s. 1; c. 713, s. 21; 1985, c. 651, s. 1; 1989, c. 407, s. 1; 1995, c. 262, s. 1.)

Editor's Note. — Session Laws 1995, c. 262, s. 1, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under this section, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Cited in Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993).

§ 28A-25-1.1. Collection of property by affidavit when decedent dies testate.

(a) When a decedent dies testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee, stating:

(1) The name and address of the affiant and the fact that he is the public administrator, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent;

(2) The name of the decedent and his residence at time of death;

(3) The date and place of death of the decedent;

(4) That 30 days have elapsed since the death of the decedent;

(5) That the decedent died testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value;

(6) That the decedent's will has been admitted to probate in the court of the proper county and a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of his death;

(7) That a certified copy of the decedent's will is attached to the affidavit;

(8) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;

(9) The names and addresses of those persons who are entitled, under the provisions of the will, or if applicable, of the Intestate Succession Act, to the property of the decedent; and their relationship, if any, to the decedent; and

(10) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

In those cases in which the affiant is the surviving spouse, is entitled to all of the property of the decedent, and is not disqualified under G.S. 28A-4-2, the property described in this subsection that may be collected pursuant to this section may exceed ten thousand dollars ($10,000) in value but shall not exceed twenty thousand dollars ($20,000) in value. In such cases, the affidavit shall state: (i) the name and address of the affiant and the fact that he or she is the surviving spouse and is entitled, under the provisions of the decedent's will, or if applicable, of the Intestate Succession Act, to all of the property of the decedent; (ii) that the decedent died testate leaving personal property, less liens and encumbrances thereon, not exceeding twenty thousand dollars ($20,000); and (iii) the information required under subdivisions (2), (3), (4), (6), (7), (8), and (10) of this subsection.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy shall be mailed by the clerk to the persons shown in the affidavit as entitled to the property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1985, c. 651, s. 2; 1987, c. 670, s. 1; 1989, c. 407, s. 2; 1995, c. 262, s. 2.)

Editor's Note. — Session Laws 1985, c. 651, s. 7 made this section effective October 1, 1985.

Session Laws 1995, c. 262, s. 2, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

§ 28A-25-2. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to an affidavit meeting the requirements of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) is discharged and released to the same extent as if he dealt with a duly qualified personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in an action brought for that purpose by or on behalf of the persons entitled thereto. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) made the action necessary. The heir or creditor to whom payment, delivery, transfer or issuance is made is answerable and accountable therefore to any duly qualified personal representative or collector of the decedent's estate or to any other person having an interest in the estate. (1973, c. 1329, s. 3; 1985, c. 651, s. 3; 1987, c. 670, s. 2.)

§ 28A-25-3. Disbursement and distribution of property collected by affidavit.

(a) If there has been no personal representative or collector appointed by the clerk of superior court, the affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall:

(1) Disburse and distribute the same in the following order:

a. To the payment of the surviving spouse's year's allowance and the children's year's allowance assigned in accordance with G.S. 30-15 through G.S. 30-33;

b. To the payment of the debts and claims against the estate of the decedent in the order of priority set forth in G.S. 28A-19-6, or to the reimbursement of any person who has already made payment thereof;

c. To the distribution of the remainder of the personal property to the persons entitled thereto under the provisions of the will or of the Intestate Succession Act; and

(2) File an affidavit with the clerk of superior court that he has collected the personal property of the decedent and the manner in which he has disbursed and distributed the same. This final affidavit shall be filed within 90 days of the date of filing of the qualifying affidavit provided for in G.S. 28A-25-1 or G.S. 28A-25-1.1. If the affiant cannot file the final affidavit within 90 days, he shall file a report with the clerk within that time period stating his reasons. Upon determining that the affiant has good reason not to file the final affidavit within 90 days, the clerk may extend the time for filing up to one year from the date of filing the qualifying affidavit.

(b) Nothing in this section shall be construed as changing the rule of G.S. 28A-15-1 and G.S. 28A-15-5 rendering both real and personal property, without preference or priority, available for the discharge of debts and other claims against the estate of the decedent. If it appears that it may be in the best interest of the estate to sell, lease, or mortgage any real property to obtain money for the payment of debts or other claims against the decedent's estate, the affiant shall petition the clerk of superior court for the appointment of a personal representative to conclude the administration of the decedent's estate pursuant to G.S. 28A-25-5. (1973, c. 1329, s. 3; 1983, c. 711, s. 1; 1985, c. 651, s. 4; 1987, c. 670, s. 3; 1989, c. 407, s. 3.)

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App.

357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

§ 28A-25-4. Clerk may compel compliance.

If any affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall fail to make distribution or file affidavit as required by G.S. 28A-25-3, the clerk of superior court may, upon his own motion or at the request of any interested person, issue an attachment against him for a contempt and commit him until he makes proper distribution and files the affidavit. In addition to or in lieu of filing this attachment, the clerk may require the affiant to post a bond conditioned as provided in G.S. 28A-8-2. (1973, c. 1329, s. 3; 1983, c. 711, s. 2; 1985, c. 651, s. 5; 1987, c. 670, s. 4; 1989, c. 407, s. 4.)

CASE NOTES

Challenging Order Under this Section. — Order of contempt and commitment entered against plaintiff-executor for failure to file account on estate and to appear and show cause was a valid court order pursuant to this section. In contesting this court order, plaintiff's proper course of action would have been to appeal the order itself. Instead, plaintiff attacked the order by seeking declaratory relief and the expunction of his records in a wholly separate action. The trial court had no authority to grant plaintiff the relief sought in that it had no power collaterally to vacate the order of contempt and commitment. Therefore, the trial court's dismissal of plaintiff's claim under Rules 12(b)(1) and (6) was proper. Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993), pet. disc. review denied, 334 N.C. 164, 432 S.E.2d 362 (1993).

§ 28A-25-5. Subsequently appointed personal representative or collector.

Nothing in this Article shall preclude any interested person, including the affiant, from petitioning the clerk of superior court for the appointment of a personal representative or collector to conclude the administration of the decedent's estate. If such is done, the affiant who has been collected personal property by affidavit shall cease to do so, shall deliver all assets in his possession to the personal representative, and shall render a proper accounting to the personal representative or collector. A copy of the accounting shall also be filed with the clerk having jurisdiction over the personal representative or collector. (1973, c. 1329, s. 3; 1975, c. 300, s. 10; 1985, c. 651, s. 6; 1987, c. 670, s. 5.)

§ 28A-25-6. Payment to clerk of money owed decedent.

(a) As an alternative to the small estate settlement procedures of this Article, any person indebted to a decedent may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the decedent:

(1) If no administrator has been appointed, and

(2) If the amount owed by such person does not exceed five thousand dollars ($5,000), and

(3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands

belonging to the decedent exceed five thousand dollars ($5,000).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one decedent would exceed five thousand dollars ($5,000), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed five thousand dollars ($5,000).

(c) If the sum tendered pursuant to this section would make the aggregate sum coming into the clerk's hands with respect to any one decedent exceed five thousand dollars ($5,000) the clerk shall appoint an administrator, or the sum may be administered under the preceding sections of this Article.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to this section would not exhaust funds received pursuant to this section, he may, in his discretion, appoint an administrator, or the funds may be administered under the preceding sections of this Article.

(e) The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section is a full release to the debtor for the payment so made.

(f) If no administrator has been appointed, the clerk of superior court shall disburse the money received under this section for the following purposes and in the following order:

(1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
(2), (3) Repealed by Session Laws 1981, c. 383, s. 3.
(4) All other claims shall be disbursed according to the order set out in G.S. 28A-19-6.

Notwithstanding the foregoing provisions of this subsection, the clerk shall pay, out of funds provided the deceased pursuant to G.S. 111-18 and Part 3 of Article 2 of Chapter 108A of the General Statutes of North Carolina, any lawful claims for care provided by an adult care home to the deceased, incurred not more than 90 days prior to his death. After the death of a spouse who died intestate and after the disbursements have been made in accordance with this subsection, the balance in the clerk's hands belonging to the estate of the decedent shall be paid to the surviving spouse, and if there is no surviving spouse, the clerk shall pay it to the heirs in proportion to their respective interests.

(g) The clerk shall not be required to publish notice to creditors.

(h) Whenever an administrator is appointed after a clerk of superior court has received any money pursuant to this section, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commissions for payments made to the administrator, and the administrator shall receive no commissions for receiving such payments. (1921, c. 93; Ex. Sess. 1921, c. 65; C.S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1955, c. 1246, ss. 103; 1957, c. 491; 1959, c. 795, ss. 1-4; 1965, c. 576, s. 1; 1973, c. 23; c. 1329, s. 1; 1975, c. 344; 1979, c. 163; c. 762, s. 1; 1981, c. 383, s. 3; 1983, c. 65, s. 2; 1987, c. 282, s. 6; 1989 (Reg. Sess., 1990), c. 1015, s. 1; 1995, c. 535, s. 2.)

Editor's Note. — Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

ARTICLE 26.

Foreign Personal Representatives and Ancillary Administration.

§ 28A-26-6. Jurisdiction.

CASE NOTES

Applied in Powles v. Kandrasiewicz, 886 F. Supp. 1261 (W.D.N.C. 1995).

ARTICLE 27.

Apportionment of Federal Estate Tax.

§ 28A-27-1. Definitions.

For the purposes of this Article:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax.

(2) "Fiduciary" includes a personal representative and a trustee.

(3) "Person" means any individual, partnership, association, joint stock company, corporation, governmental agency, including any multiples or combinations of the foregoing as, for example, individuals as joint tenants.

(4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent any property or interest therein included in the decedent's taxable estate.

(5) "State" means any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(6) "Tax" means the net Federal Estate Tax due, after application of any available unified transfer tax credit, and interest and penalties imposed in addition to the tax. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess. 1986), c. 878, s. 3 made this Article effective October 1, 1986. As to the applicability of the provisions of this Article, see § 28A-27-9.

§ 28A-27-2. Apportionment.

(a) Except as otherwise provided in subsection (b) of this section, or in G.S. 28A-27-5, G.S. 28A-27-6, or G.S. 28A-27-8, the tax shall be apportioned among all persons interested in the estate in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values as finally determined for federal estate tax purposes shall be used for the purposes of this computation.

(b) In the event the decedent's will provides a method of apportionment of the tax different from the method provided in subsection (a) above, the method described in the will shall control. However, in the case of any will executed on or after October 1, 1986, a general direction in the will that taxes shall not be apportioned, whether or not referring to this Article, but shall be paid from the residuary portion of the estate shall not, unless specifically stated otherwise, apply to taxes imposed on assets which are includible in the valuation of the decedent's gross estate for federal estate tax purposes only by reason of Sections 2041, 2042 or 2044 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. In the case of an estate administered under any will executed on or after October 1, 1986, in the event that the estate tax computation involves assets described in the preceding sentence, unless specifically stated otherwise, apportionment shall be made against such assets and the tax so apportioned shall be recovered from the persons receiving such assets as provided in Sections 2206, 2207 or 2207A of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, s. 1.)

CASE NOTES

Cited in Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995).

§ 28A-27-3. Procedure for determining apportionment.

(a) The personal representative of a decedent shall determine the apportionment of the tax.

(b) If the personal representative finds that it is inequitable to apportion interest and penalties in the manner provided in this Article because such interest or penalties were imposed due to the fault of one or more persons interested in the estate he may direct apportionment thereon in the manner he finds equitable.

(c) The expenses reasonably incurred by the personal representative in connection with the apportionment of the tax shall be apportioned as provided for taxes under this Article. If the personal representative finds that it is inequitable to apportion the expenses because such expenses were incurred because of the fault of one or more persons interested in the estate he may direct other more equitable apportionment. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-4. Uncollected tax.

The personal representative shall not be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the six months next following final determination of the tax. A personal representative who institutes the suit or proceeding within a reasonable time after the six months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be apportioned among the other persons interested in the estate who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person interested in the estate bears to the total value of the interests of all remaining persons interested in the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-5. Exemptions, deductions, and credits.

(a) Any interest for which a deduction or exemption is allowed under the federal revenue laws in determining the value of the decedent's net taxable estate, such as property passing to or in trust for a surviving spouse and gifts or bequests for charitable, public, or similar purposes, shall not be included in the computation provided for in G.S. 28A-27-2 to the extent of the allowable deduction or exemption. When such an interest is subject to a prior present interest which is not allowable as a deduction or exemption, such present interest shall not be included in the computation provided for in this Article and no tax shall be apportioned to or paid from principal.

(b) Any credit for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment; provided, however, that if the tax which gives rise to such a credit has in fact been paid by a person interested in the estate, the benefit of such credit shall inure to that person paying the tax.

(c) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.

(d) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowed deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Article, and to that extent no apportionment shall be made against the property. This section does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954 of the United States or corresponding provisions of any subsequent tax law, relating to deduction for State death taxes on transfers for public charitable or religious uses. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, ss. 2, 3.)

§ 28A-27-6. No apportionment between temporary and remainder interests.

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-7. Fiduciary's rights and duties.

(a) The personal representative may withhold from any property of the decedent in his possession, distributable to any person interested in the estate, the amount of the tax apportioned to his interest. If the property in possession of the personal representative and distributable to any person interested in the estate tax is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative he may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Article.

(b) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the clerk of superior court having jurisdiction of the administration of the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-8. Difference with Federal Estate Tax Law.

If the liabilities of persons interested in the estate as prescribed by this Article differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this Article shall apply as if the resulting liabilities had been prescribed herein. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-9. Effective date.

The provisions of this Article shall not apply to taxes due on account of the death of decedents dying prior to October 1, 1986. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

ARTICLE 28.

Summary Administration.

§ 28A-28-1. Summary administration where spouse is sole beneficiary.

When a decedent dies testate or intestate leaving a surviving spouse as the sole devisee or heir, the surviving spouse may file a petition for summary administration with the clerk of superior court of the county where the decedent was domiciled at the time of death. This procedure is available if the decedent died partially testate, provided that the surviving spouse is the sole devisee under the will and the sole heir of the decedent's intestate property. This procedure is not available if the decedent's will provides that it is not available or if the devise to the surviving spouse is in trust rather than outright. (1995, c. 294, s. 1.)

Editor's Note. — Session Laws 1995, c. 294, s. 2, provides that this Article becomes effective January 1, 1996, and is applicable to the estates of decedents dying on or after that date.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 28A-28-2. Petition.

(a) The petition shall be signed by the surviving spouse and verified to be accurate and complete to the best of the spouse's knowledge and belief and shall state as follows:

(1) The name and address of the spouse and the fact that he or she is the surviving spouse of the decedent;

(2) The name and domicile of the decedent at the time of death;

(3) The date and place of death of the decedent;

(4) The date and place of marriage of the spouse and the decedent;

(5) A description sufficient to identify each tract of real property owned in whole or in part by the decedent at the time of death;

(6) A description of the nature of the decedent's personal property and the location of such property, as far as these facts are known or can with reasonable diligence be ascertained;

(7) The probable value of the decedent's personal property, so far as the value is known or can with reasonable diligence be ascertained;

(8) That no application or petition for appointment of a personal representative is pending or has been granted in this State;

(9) That the spouse is the sole devisee or sole heir, or both, of the decedent, and that there is no other devisee or heir; that the decedent's will, if any, does not prohibit summary administration; and that any property passing to the spouse under the will is not in trust;

(10) The name and address of any executor or coexecutor named by the will and that, if the decedent died testate, a

copy of the petition has been personally delivered or sent by first-class mail by the spouse to the last-known address of any executor or coexecutor named by the will, if different from the spouse;

(11) That, to the extent of the value of the property received by the spouse under the will of the decedent or by intestate succession, the spouse assumes all liabilities of the decedent that were not discharged by reason of death and assumes liability for all taxes and valid claims against the decedent or the estate, as provided in G.S. 28A-28-6; and

(12) If the decedent died testate, that the decedent's will has been admitted to probate in the court of the proper county; that a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of death; and that a certified copy of the decedent's will is attached to the petition.

(b) The petition shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307 and shall be indexed in the index to estates. (1995, c. 294, s. 1; c. 509, s. 135.2(a).)

Effect of Amendments. — The 1995 amendment by Session Laws 1995, c. 509, s. 135.2(a), effective January 1, 1996, substituted "be" for "by" preceding "ascertained" in subdivision (a)(6).

§ 28A-28-3. Clerk's order.

If it appears to the clerk that the petition and supporting evidence, if any, comply with the requirements of G.S. 28A-28-2 and on the basis thereof the spouse is entitled to summary administration, the clerk shall enter an order to that effect and no further administration of the estate is necessary. Nothing in this section shall preclude a petition under the provisions of G.S. 28A-28-7(a) or the appointment of a personal representative or a collector under the provisions of Article 6 or Article 11 of this Chapter. (1995, c. 294, s. 1.)

§ 28A-28-4. Effect of order.

(a) The presentation of a certified copy of the order described in G.S. 28A-28-3 shall be sufficient to require the transfer to the spouse of any property or contract right owned by the decedent at the time of death, including but not limited to: (i) wages and salary; (ii) the title and license to a motor vehicle registered in the name of the decedent owner; (iii) the ownership rights of a savings account, checking account, or certificate of deposit in a bank in the name of the decedent owner; (iv) the ownership rights of a savings account, share certificate, or certificate of deposit in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; and (v) the ownership rights in any stock or security registered on the books of a corporation in the name of the decedent owner.

(b) After the entry of the order described in G.S. 28A-28-3, the spouse may convey, lease, sell, or mortgage any real property devised to or inherited by the spouse from the decedent, at public or private sale, upon such terms as the spouse may determine. This section shall not limit any other powers the spouse may have over property devised to or inherited by the spouse from the decedent. The provisions of G.S. 28A-17-12 are not applicable to a conveyance, sale, lease, or mortgage under this subsection. (1995, c. 294, s. 1.)

§ 28A-28-5. Effect of payment.

The person paying, delivering, transferring, or issuing property or the evidence thereof pursuant to the order described in G.S. 28A-28-3 is discharged and released to the same extent as if the person dealt with a duly qualified personal representative of the decedent. The person is not required to see to the application of the property or evidence thereof or to inquire into the truth of any statement in the petition or order.

If any person to whom the order is presented refuses to pay, deliver, transfer, or issue any property or evidence thereof, the property may be recovered or its payment, delivery, transfer, or issuance may be compelled in an action brought for that purpose by the surviving spouse. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-28-4 made the action necessary. (1995, c. 294, s. 1.)

§ 28A-28-6. Spouse's assumption of liabilities.

If the clerk grants the order for summary administration, the spouse shall be deemed to have assumed, to the extent of the value of the property received by the spouse under the will of the decedent or by intestate succession, all liabilities of the decedent that were not discharged by reason of death and liability for all taxes and valid claims against the decedent or the estate. The value of the property is the fair market value of the property on the date of death of the decedent less any liens or encumbrances on the property so received. The spouse may assert any defense, counterclaim, cross-claim, or setoff which would have been available to the decedent if the decedent had not died except for actions listed in G.S. 28A-18-1(b). A spouse shall not be deemed to have assumed any liabilities of the decedent that were discharged by reason of death. (1995, c. 294, s. 1.)

§ 28A-28-7. Right to petition for appointment of personal representative; discharge of spouse's liability.

(a) Nothing in this Article shall preclude any person qualified to serve as personal representative pursuant to G.S. 28A-4-1, including the surviving spouse, from petitioning the clerk of superior court for the appointment of a personal representative or collector to administer the decedent's estate. If a personal representative or collector is appointed, the spouse shall render a proper accounting to the personal representative or collector and file a copy of the accounting with the clerk. The spouse shall deliver assets of the decedent's estate, cash, or other property and shall be discharged of liability in accordance with the provisions of subsection (b) of this section.

(b) In the event that a personal representative or collector is appointed, the spouse shall be discharged of liability for the debts of the decedent as follows:

(1) If the spouse delivers to the personal representative or collector all of the property received by the spouse in the identical form that it was received by the spouse, then the spouse will be discharged of all liability.

(2) If the spouse does not deliver to the personal representative or collector all of the property in the identical form that it was received by the spouse, then the spouse shall be discharged of liability as follows:

  a. For property delivered to the personal representative or collector that is in the identical form that it was received by the spouse, the spouse is discharged to the extent of the fair market value of the property at the time of the decedent's death or the fair market value at the time the property was received by the personal representative or collector, whichever is greater.

  b. For property delivered to the personal representative or collector that is not in the identical form that it was received by the spouse, the spouse is discharged to the extent of the fair market value of such property at the time it was delivered to the personal representative or collector. (1995, c. 294, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

Chapter 29.

Intestate Succession.

Article 2.

Shares of Persons Who Take upon Intestacy.

Sec.
29-14. Share of surviving spouse.
29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Legal Periodicals. —

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Cited in In re Estate of Finch, 97 N.C. App. 489, 389 S.E.2d 126 (1990).

§ 29-2. Definitions.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Role'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
III. Estate.
IV. Net Estate.
VI. Heirs.
VII. Lineal Descendants.
VIII. Costs of Administration.

I. GENERAL CONSIDERATION.

Quoted in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

Cited in Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

III. ESTATE.

"Estate" Defined. — Estate of a decedent includes all property owned by decedent which she may direct to her legatees and devisees under will and which would pass to her heirs and next of kin under laws of intestacy if she died without will. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

IV. NET ESTATE.

Property Owned as Tenants by the Entirety. — The value of real property owned by couple as tenants by the entirety should not be included in testatrix's net estate for purposes of the dissent statute. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, cert. denied, 325 N.C. 708, 388 S.E.2d 456 (1989).

VI. HEIRS.

Technical Construction of Term "Heirs." — Absent words expressing testatrix' contrary intent, the court would construe the word "heirs" in will in the technical sense. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Consideration of Laws in Effect at Time of Death. — In construing a will with a remainder interest to a class of the testatrix' "heirs," the courts look to the intestacy laws in effect at the testatrix' death to determine who the "heirs" are and the shares which they are entitled to take, unless the language of the will reveals a contrary intent. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

For discussion of construction of the phrase "to my nearest (relatives) heirs" in the remainder clause of a devise by testatrix who died in May, 1962, see Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

VII. LINEAL DESCENDANTS.

Children Distinguished from Others. — The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Illegitimate and Adopted Children Included. — The term "lineal descendants" would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Children Adopted by Wife's Second Husband. — Children born to wife and her first husband became lineal descendants of her second husband upon his adoption of them because they became in law his children. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

VIII. COSTS OF ADMINISTRATION.

Costs of administration, as used in subdivision (5) of this section, means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In re Estate of Ward, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

§ 29-4. Curtesy and dower abolished.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

Cited in Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

§ 29-5. Computation of next of kin.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Editor's Note. — The case of In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967), cited under this section in the main volume, has been abrogated by statute. See § 41-6.1.

§ 29-8. Partial intestacy.

CASE NOTES

Section Codifies Common Law. — This section, which was adopted in 1959, was a codification of the common law. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Section Adopts Majority Rule. — The rule adopted by this section is also in accordance with the rule followed by a majority of the sister states. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

This section creates a mandatory plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession without regard to the intent expressed by a testator in a will. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Presumption against partial intestacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will. The presumption must yield when outweighed by manifest and unequivocal intent. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

Illustrative Case. — Where, as gleaned from will itself, the intent of the testator was that the residue of his estate was to pass to named beneficiaries under the residuary clause of the will only if testator's wife survived him, and she did not, the residue would pass to his heirs at law in accordance with the laws of intestacy as enacted by the legislature. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

Where decedent did not provide a testamentary disposition of four parcels of land, either specifically or through a residuary clause, the land did not pass under decedent's will, but instead qualified as a partial intestacy. Tarlton v. Stidham, 122 N.C. 77, 469 S.E.2d 38 (1996).

§ 29-9. Inheritance by unborn infant.

Legal Periodicals. — For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 29-10. Renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to October 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Collateral Attack. — The legality of plaintiff's renunciation under this section as it read prior to Oct. 1, 1975, was a matter before the clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's "Petition to Renounce." As a party to the original action, plaintiff could not later collaterally attack it. Hinson v. Hinson, 80 N.C. App. 561, 343

S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

(a) Real Property. — The share of the surviving spouse in the real property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, a one-half undivided interest in the real property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, a one-third undivided interest in the real property;

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by one or more parents, a one-half undivided interest in the real property;

(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or by a parent, all the real property.

(b) Personal Property. — The share of the surviving spouse in the personal property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net personal property does not exceed thirty thousand dollars ($30,000) in value, all of the personal property; if the net personal property exceeds thirty thousand dollars ($30,000) in value, the sum of thirty thousand dollars ($30,000) plus one half of the balance of the personal property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net personal property does not exceed thirty thousand dollars ($30,000) in value, all of the personal property; if the net personal property exceeds thirty thousand dollars ($30,000) in value, the sum of thirty thousand dollars ($30,000) plus one third of the balance of the personal property;

(3) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net personal property does not exceed fifty thousand dollars ($50,000) in value, all of the personal property; if the net personal property exceeds fifty thousand dollars ($50,000) in value, the sum of fifty thousand dollars ($50,000) plus one half of the balance of the personal property;

(4) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, all of the personal property. (1959, c. 879, s. 1; 1979, c. 186, s. 1; 1981, c. 69; 1995, c. 262, s. 3.)

Editor's Note. — Session Laws 1979, c. 186, s. 1, which became effective October 1, 1979, and was applicable to the estates of decedents dying on or after that date, rewrote this section to read as follows:

"§ 29-14. *Share of surviving spouse.*

"(a) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-half of the balance of the net estate; or

"(b) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-third of the balance of the net estate; or

"(c) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net estate does not exceed twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be twenty-five thousand dollars ($25,000) in value plus one-half of the balance of the net estate; or

"(d) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, the share of the surviving spouse shall be the entire net estate.

"(e) If under subsections (a), (b), or (c) of this section the surviving spouse is not entitled to the entire net estate, the surviving spouse may elect to take his or her share wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the surviving spouse may elect. The election of the surviving spouse may be made by written instrument filed with the personal representative within seven months after the issuance of letters testamentary or letters of administration. By agreement between the personal representative and the surviving spouse, or by order of the Clerk of Superior Court upon good cause shown, the seven month period for the surviving spouse's election may be extended. If the surviving spouse is the personal representative, any extension shall be granted by the Clerk of Superior Court. If no election is filed within seven months, and no extension has been agreed to or ordered, the personal representative shall distribute the share of the surviving spouse wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the personal representative may determine."

For the version of this section as in effect prior to the 1979 amendment, see Session Laws 1959, c. 879, s. 1.

Session Laws 1981, c. 69, which became effective March 5, 1981, and is applicable to estates of persons dying on or after that date, again rewrote this section, to read as set out in the main volume.

Session Laws 1995, c. 262, s. 3, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Absence of Lineal Descendants. — Where decedent was not survived by a child, children, or any lineal decedent of a deceased child or children, or by a parent, surviving spouse was proper recipient of remainder interest in four parcels of land that passed as partial intestacy. Tarlton v. Stidham, 122 N.C. App. 77, 469 S.E.2d 38 (1996).

Remarriage Restores All Rights and Privileges. — When a married couple enters into a separation agreement, later divorces, and then remarries, each party to the marriage regains all rights and privileges incident to marriage unless there is evidence to the contrary. Batten v. Batten, 125 N.C. App. 685, 482 S.E.2d 18 (1997).

Quoted in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Stated in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

Cited in Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985); In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Applied in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Stated in Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993); Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Cited in McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988); Brimley v. Logging, 93 N.C. 467, 378 S.E.2d 52 (1989); Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

There is no logical reason for the Court of Appeals to favor a per capita distribution over a per stirpes distribution absent the intent of the testatrix as ascertained from the four corners of the will. Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Applied in Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Stated in Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Jamin v. Williamson, 94 N.C. App. 699, 381 S.E.2d 345 (1989); Allen v. Piedmond Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994).

Article 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under this section. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The purpose of subsection (e) of this section is to make it clear that the relationship of parent and child is not severed when the child is adopted by the spouse of the biological parent. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Biological Parent Need Not Join in Spouse's Petition for Adoption of Children. — Subsection (e) of this section and § 48-7(d) were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of § 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

Article 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.

CASE NOTES

Cited in Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Legal Periodicals. — For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

In General. — Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the methods established in §§ 49-10 through 49-14, or if paternity has been established in an action for criminal nonsupport. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Birth certification amendment application form did not meet requirements of subsection (b) where it contained no statement by the putative father or anyone else that he was the father of the child, and even if his signature in the blank space involved could be construed to be an unambiguous acknowledgment of paternity, he did not swear to it before any official authorized to administer oaths. In re Will of Bunch, 86 N.C. App. 463, 358 S.E.2d 118 (1987).

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under subsection (a) of this section, and clearly includes adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Right to Inherit Established upon Adjudication of Paternity. —

A putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in § 29-19(b). In re Estate of Morris, 123 N.C. App. 264, 472 S.E.2d 786 (1996).

Acknowledgment Not Filed. — Where petitioner acknowledged his paternity before a notary public and executed the "Affidavit Of Parentage For Child Born Out Of Wedlock" but never filed the acknowledgment with the clerk of court, he did not fulfill all the requirements under § 29-19(b). In re Estate of Morris, 123 N.C. App. 264, 472 S.E.2d 786 (1996).

Compliance with Section Essential. — Where there has been no compliance with this section, illegitimate child has no right to inherit from deceased putative father. Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986), cert. denied and appeal dismissed, 319 N.C. 224, 353 S.E.2d 402, cert. denied, 484 U.S. 824, 108 S. Ct. 88, 98 L. Ed. 2d 50 (1987).

Plea of Guilty in Bastardy Action as Basis for Inheritance by Child. — An illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity to the child by pleading guilty in a criminal bastardy action. Sanders v. Brantley, 71 N.C. App. 797, 323 S.E.2d 426 (1984).

This section confers upon illegitimate children same rights enjoyed by legitimate children under laws of intestate succession once there is proper adjudication or acknowledgment of paternity. Notification of the personal representative within six months of published notice to creditors does not establish or define the illegitimate child's right, but merely sets a time limitation for an illegitimate child to seek its enforcement. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Subsection (b) is Statute of Limitation. — The six-month limitation period in subsection (b), relating to notice of the claim of an illegitimate child to take from father's estate, is a statute of limitation which is subject to being tolled under the provisions of § 1-17. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applied in Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Cited in Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989).

ARTICLE 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

(a) In lieu of the share provided in G.S. 29-14 or 29-21, the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

(1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or

(2) Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or

(3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or

(4) Is otherwise not legally entitled to the election provided in this section.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

(c) The election provided for in subsection (a) shall be made by the filing of a notice thereof with the clerk of the superior court of the county in which the administration of the estate is pending, or, if no administration is pending, then with the clerk of the superior court of any county in which the administration of the estate could be commenced. Such election shall be made:

(1) At any time within one month after the expiration of the time fixed for the filing of a dissent, or

(2) In case of intestacy, then within 12 months after the death of the deceased spouse if letters of administration are not issued within that period, or

(3) If letters of administration are issued within 12 months after the date of the death of the deceased spouse, then within one month after the expiration of the time limited for filing claims against the estate, or

(4) If litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(c1) The notice of election shall:

(1) Be directed to the clerk with whom filed;

(2) State that the surviving spouse making the same elects to take under this section rather than under the provisions of G.S. 29-14 or 29-21, as applicable;
(3) Set forth the names of all heirs, devisees, legatees, personal representatives and all other persons in possession of or claiming an estate or an interest in the property described in subsection (a); and
(4) Request the allotment of the life estate provided for in subsection (a).

(c2) The notice of election may be in person, or by attorney authorized in a writing executed and duly acknowledged by the surviving spouse and attested by at least one witness. If the surviving spouse is a minor or an incompetent, the notice of election may be executed and filed by a general guardian or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the notice of election may be executed and filed by a next friend appointed by the clerk. The notice of election, whether in person or by attorney, shall be filed as a record of the court, and a summons together with a copy of the notice shall be served upon each of the interested persons named in the notice of election.

(d) In case of election to take a life estate in lieu of an intestate share, as provided in either G.S. 29-14, 29-21, or 30-3(a), the clerk of superior court, with whom the notice of election has been filed, shall summon and appoint a jury of three disinterested persons who being first duly sworn shall promptly allot and set apart to the surviving spouse the life estate provided for in subsection (a) and make a final report of such action to the clerk.

(e) The final report shall be filed by the jury not more than 60 days after the summoning and appointment thereof, shall be signed by all jurors, and shall describe by metes and bounds the real estate in which the surviving spouse shall have been allotted and set aside a life estate. It shall be filed as a record of court and a certified copy thereof shall be filed and recorded in the office of the register of deeds of each county in which any part of the real property of the deceased spouse, affected by the allotment, is located.

(f) In the election and procedure to have the life estate allotted and set apart provided for in this section, the rules of procedure relating to partition proceedings shall apply except insofar as the same would be inconsistent with the provisions of this section.

(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:
(1) By a mortgage or deed of trust in which the surviving spouse has waived his or her rights by joining with the other spouse in the making thereof; or
(2) By a purchase money mortgage or deed of trust, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the marriage; or
(3) By a mortgage or deed of trust made prior to the marriage; or
(4) By a mortgage or deed of trust constituting a lien on the property at the time of its acquisition by the deceased spouse either before or during the marriage.

(h) If no election is made in the manner and within the time provided for in subsection (c) the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased spouse by virtue of this section shall terminate. (1959, c. 879, s. 1; 1961, c. 958, ss. 4-8; 1965, c. 848; 1997-456, s. 27.)

Editor's Note. — The subsection designations (c1) and (c2) were added pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

For comment, "The Uniform Probate Code's 'Augmented Estate' Concept: A Remedy for the North Carolina Dissent Statute," see 12 Campbell L. Rev. 425 (1990).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Separately Conveyed Property Subject to Life Estate. — Where a married person conveys separate property without permission or joinder of their spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. Melvin v. Mills-Melvin, — N.C. App. —, 486 S.E.2d 84 (1997).

Chapter 30.

Surviving Spouses.

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

Sec.
30-15. When spouse entitled to allowance.
30-16. Duty of personal representative, magistrate, or clerk to assign allowance.
30-17. When children entitled to an allowance.

Part 2. Assigned by Magistrate or Clerk.

Sec.
30-19. Value of property ascertained.
30-20. Procedure for assignment.
30-21. Report of clerk or magistrate.
30-23. Right of appeal.
30-24. Hearing on appeal.
30-26. When above allowance is in full.

Part 3. Assigned in Superior Court.

30-29. What complaint must show.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

Legal Periodicals. —
For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

I. General Consideration.
III. Valuation of Estate.

I. GENERAL CONSIDERATION.

The legislature has created a two-step process to be used when a surviving spouse attempts to dissent from a deceased spouse's will: the first step is to determine if the surviving spouse has the right to dissent, and the second step is to determine the consequences of the dissent. Funk v. Masten, 121 N.C. App. 364, 465 S.E.2d 322 (1996).

The right to dissent is not an obligation to dissent, it is a common principle of law that a surviving spouse must elect between taking under a will and dissenting from the will; the spouse cannot do both, the election of one precludes the other. Tarlton v. Stidham, 122 N.C. App. 77, 469 S.E.2d 38 (1996).

Cited in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

III. VALUATION OF ESTATE.

And Right Cannot Be Established Until Property Is Determined and Valued. —
Where the record was bare of any recitation of the values necessary to determine if plaintiff could indeed dissent from decedent's will, and contained no findings or conclusions as to plaintiff's right to dissent, the issue was not ripe for resolution and was nonjusticiable. Funk v. Masten, 121 N.C. App. 364, 465 S.E.2d 322 (1996).

Excluded Property. — The plain meaning of this section completely excludes any property or interest in property to the extent that the surviving spouse gave, donated, contributed, or paid for it. Once the property is excluded, no other valuation as to that specific property may be made. Funk v. Masten, — N.C. App. —, 485 S.E.2d 890 (1997).

§ 30-2. Time and manner of dissent.

CASE NOTES

Statute Tolled by Disability. — The six-month period of limitation in this section for dissenting from a will in probate is a statute of limitations which can be tolled by § 1-17 for a disability. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of ten thousand dollars ($10,000) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C.S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14; 1981, c. 413, s. 1; 1995, c. 262, s. 4.)

Editor's Note. — Session Laws 1995, c. 262, s. 4, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

CASE NOTES

Quoted in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 30-16. Duty of personal representative, magistrate, or clerk to assign allowance.

It shall be the duty of every administrator, collector, or executor of a will, on application in writing, signed by the surviving spouse, at any time within one year after the death of the deceased spouse, to assign to the surviving spouse the year's allowance as provided in this Article.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a magistrate or clerk of court, as provided in G.S. 30-20, for 10 days after the surviving spouse has filed the aforesaid application, or if the surviving spouse is the personal representative, the surviving spouse may make application to the magistrate or clerk, and it shall be the duty of the magistrate or clerk to proceed in the same manner as though the application had been made by the personal representative.

Where any personal property of the deceased spouse shall be located outside the township or county where the deceased spouse resided at the time of his death, the personal representative or the surviving spouse may apply to any magistrate or to any clerk of court of any township or county where such personal property is located, and it shall be the duty of such magistrate or clerk to assign the year's allowance as if the deceased spouse had resided and died in that township. (1868-9, c. 93, s. 12; 1870-1, c. 263; Code, ss. 2120, 2122; 1889, cc. 496, 531; 1891, c. 13; Rev., ss. 3096, 3098; C.S., ss. 4113, 4115; 1961, c. 749, s. 2; 1971, c. 528, s. 21; 1997-310, s. 1.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, substituted "representative, magistrate, or clerk" for "representative or magistrate" in the catchline; in the second paragraph inserted "or clerk of court" and "or clerk"; and in the last paragraph inserted "or to any clerk of court" and "or clerk".

§ 30-17. When children entitled to an allowance.

Whenever any parent dies leaving any child under the age of 18 years, including an adopted child or a child with whom the widow may be pregnant at the death of her husband, or a child who is less than 22 years of age and is a full-time student in any educational institution, or a child under 21 years of age who has been declared mentally incompetent, or a child under 21 years of age who is totally disabled, or any other person under the age of 18 years residing with the deceased parent at the time of death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of two thousand dollars ($2,000) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within 10 days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a magistrate or clerk of court upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child, regardless of whether the deceased died testate or intestate or whether the widow dissented from the will. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C.S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2;

1961, c. 316, s. 2; c. 749, s. 3; 1969, c. 269; 1971, c. 528, s. 22; 1973, c. 1411; 1975, c. 259; 1981, c. 413, s. 2; c. 599, s. 7; 1995, c. 262, s. 5; 1997-310, s. 2.)

Editor's Note. — Session Laws 1995, c. 262, s. 5, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, inserted "or clerk of court" following "magistrate" in the first paragraph.

Part 2. Assigned by Magistrate or Clerk.

§ 30-19. Value of property ascertained.

The value of the personal property assigned to the surviving spouse and children shall be ascertained by a magistrate or the clerk of court of the county in which administration was granted or the will probated. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C.S., s. 4114; 1961, c. 749, s. 5; 1971, c. 528, s. 22; 1989, c. 11, s. 1; 1997-310, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, inserted "or Clerk" in the Part heading, and inserted "or the clerk of court".

§ 30-20. Procedure for assignment.

Upon the application of the surviving spouse, a child by his guardian or next friend, or the personal representative of the deceased, the clerk of superior court of the county in which the deceased resided may assign the inquiry to a magistrate of the county. The clerk of court, or magistrate upon assignment, shall ascertain the person or persons entitled to an allowance according to the provisions of this Article, and determine the money or other personal property of the estate, and pay over to or assign to the surviving spouse and to the children, if any, so much thereof as they shall be entitled to as provided in this Article. Any deficiencies shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient to satisfy such allowance, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C.S., s. 4115; 1961, c. 749, s. 6; 1971, c. 528, s. 23; 1989, c. 11, s. 2; 1997-310, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, substituted "may assign" for "shall assign" in the first sentence, and substituted "The clerk of court, or magistrate upon assignment" for "The magistrate" in the second sentence.

§ 30-21. Report of clerk or magistrate.

The clerk of court, or magistrate upon assignment, shall make and sign three lists of the money or other personal property assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the surviving spouse, one of these lists shall be delivered to him. Where the allowance is to a child, one of these lists shall be delivered to the surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said surviving parent; or to the child if said child is not living with the surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the magistrate or clerk, within 20 days after the assignment, to the superior court of the county in which administration was granted or the will probated, and the clerk shall file and record the same, together with any judgment entered pursuant to G.S. 30-20. (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C.S., s. 4116; 1961, c. 749, s. 7; 1971, c. 528, s. 24; 1989, c. 11, s. 3; 1997-310, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, inserted "clerk or" in the catchline"; substituted "clerk of court, or magistrate upon assignment" for "magistrate" in the first sentence; and inserted "or clerk" in the last sentence.

§ 30-23. Right of appeal.

The personal representative, or the surviving spouse, or child by his guardian or next friend, or any creditor, legatee or heir of the deceased, may appeal from the finding of the magistrate or clerk of court to the superior court of the county, and, within 10 days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding 10 days after the service of the citation. (1868-9, c. 93, s. 16; Code, s. 2124; 1897, c. 442; Rev., s. 3100; C.S., s. 4117; 1961, c. 749, s. 9; 1989, c. 11, s. 4; 1997-310, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, inserted "or clerk of court".

§ 30-24. Hearing on appeal.

At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided de novo. (1868-9, c. 93, s. 17; Code, s. 2125; Rev., s. 3101; C.S., s. 4118; 1989, c. 11, s. 5; 1997-310, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, substituted "de novo" for "as other issues are directed to be", and deleted the second sentence, which read "When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the magistrate".

§ 30-26. When above allowance is in full.

If the estate of a deceased be insolvent, or if his personal estate does not exceed ten thousand dollars ($10,000), the allowances for the year's support of the surviving spouse and the children shall not, in any case, exceed the value prescribed in G.S. 30-15 and G.S. 30-17; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C.S., s. 4120; 1961, c. 749, s. 10; 1981, c. 413, s. 3; 1995, c. 262, s. 6; 1995 (Reg. Sess., 1996), c. 742, s. 17; 1997-310, s. 3.)

Editor's Note. — Session Laws 1995, c. 742, s. 17, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted "G.S." preceding "30-17".

Part 3. Assigned in Superior Court.

§ 30-29. What complaint must show.

In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded ten thousand dollars ($10,000), and also whether or not an allowance has been made to plaintiff and the nature and value thereof. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C.S., s. 4123; 1961, c. 749, s. 12; 1981, c. 413, s. 4; 1995, c. 262, s. 7.)

Editor's Note. — Session Laws 1995, c. 262, s. 7, which amended this section, was effective October 1, 1995, and applicable to estates of persons dying on or after that date.

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Sec.
31-5.4. Revocation by divorce or annulment; revival.
31-5.5. After-born or after-adopted child; illegitimate child; effect on will.
31-5.8. Revival of revoked will.

Article 5.

Probate of Will.

31-23. [Repealed.]
31-24. Examination of witnesses by affidavit.
31-25, 31-25.1. [Repealed.]

Sec.
31-27. Certified copy of will of nonresident recorded.
31-30. Validation of wills recorded without probate by subscribing witnesses.

Article 6.

Caveat to Will.

31-37.1. Parties may enter into a settlement agreement.

Article 7.

Construction of Will.

31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Applied in Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ 31-3.1. Will invalid unless statutory requirements complied with.

CASE NOTES

Codicil to a Will. — In North Carolina, a codicil to a will must be executed with the same formalities as the will. Consequently, a testamentary instrument that fails to follow the prescribed formalities is void. Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991).

§ 31-3.3. Attested written will.

CASE NOTES

I. General Consideration.
II. Signing by or for Testator.
III. Attestation by Witnesses.

I. GENERAL CONSIDERATION.

For a will to be admitted to probate, § 31-18.1(a)(1) requires that the will meet the requirements of this section and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

A codicil must be executed, etc. — In accord with main volume. See In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

Cited in In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992).

II. SIGNING BY OR FOR TESTATOR.

Assistance by Attorney. — Attorney's assisting testator to form his mark and signing testator's name legibly beside each mark did not disqualify him as a witness. In re Will of Jarvis, 334 N.C. 140, 430 S.E.2d 922 (1993).

Evidence that testator made his mark on codicil in the presence of the witnesses indicates that the instrument was his, and is sufficient to imply a request that they attest his signature. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

III. ATTESTATION BY WITNESSES.

Witnesses Need Not Sign in Presence of Each Other. — Where witness who signed the will in a location different from the other two witnesses testified and stated in her affidavit that she was a witness to the testator's mark at the request of the testator, who declared the document to be his will, the trial court did not err in finding that witness was an attesting witness. Brickhouse v. Brickhouse, 110 N.C. App. 560, 430 S.E.2d 446 (1993).

§ 31-3.4. Holographic will.

CASE NOTES

II. Testamentary Intent.
IV. Found Among Valuable Papers, etc.

II. TESTAMENTARY INTENT.

Evidence of Testamentary Intent, etc. — An instrument may not be probated as a testamentary disposition unless there is evidence that it was written with testamentary intent, that is, that the maker intended that the paper itself should operate as a will or codicil to take effect upon his death. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

Where Testamentary Intent Must Appear. — In accord with the main volume. See Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

IV. FOUND AMONG VALUABLE PAPERS, ETC.

Location of Holographic Will. — The statute requires that a paper-writing sufficient to pass as a holographic will must be found, after the death of the testator, in one of five different places: (1) among the testator's valuable papers; (2) among the testator's valuable effects; (3) in a safe-deposit box; (4) in a safe place where it was deposited by the testator or under his authority; or (5) in the possession of a person or firm with whom it was deposited by the testator or under his authority for safekeeping. In re Will of Church, 121 N.C. App. 506, 466 S.E.2d 297 (1996).

Stored in Separate Pocketbooks. — Where testator stored valuable belongings in her pocketbooks, which she kept in her bedroom, one pocketbook on the inside of her bedroom door contained insurance papers, the deed to her home and a bank book, and the handwritten document was in another pocketbook, also in her bedroom, in an envelope labelled "This is my Will", the evidence supported the trial court's finding that the handwriting was found in a "safe place." In re Will of Church, 121 N.C. App. 506, 466 S.E.2d 297 (1996).

Evidence of Finding Among Valuables. —

Evidence as to whether the document in question was found among the valuable papers and effects of the deceased or in a safe place where it was deposited by her, in satisfaction of subdivision (a)(3) of this section, was sufficient to support the jury's determination that it was a valid holographic will. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

§ 31-4. Execution of power of appointment by will.

Legal Periodicals. — For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

A provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of this section. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Article 2.

Revocation of Will.

§ 31-5.4. Revocation by divorce or annulment; revival.

Dissolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse. (1953, c. 1098, s. 6; 1977, c. 74, s. 3; 1991, c. 587, s. 1.)

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

(a) A will shall not be revoked by the subsequent birth of a child to the testator, or by the subsequent adoption of a child by the testator, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. 29-19(b), but any after-born, after-adopted or entitled after-born illegitimate child shall have the right to share in the testator's estate to the same extent he would have shared if the testator had died intestate unless:

(1) The testator made some provision in the will for the child, whether adequate or not;
(2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child;
(3) The testator had children living when the will was executed, and none of the testator's children actually take under the will;
(4) The surviving spouse receives all of the estate under the will; or
(5) The testator made provision for the child that takes effect upon the death of the testator, whether adequate or not.

(b) The provisions of G.S. 28A-22-2 shall be construed as being applicable to after-adopted children and to after-born children, whether legitimate or entitled illegitimate.

(c) The terms "after-born," "after-adopted" and "entitled after-born" as used in this section refer to children born, adopted or entitled subsequent to the execution of the will. (1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C.S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541; 1973, c. 1062, s. 2; 1985, c. 689, s. 9; 1995, c. 161, s. 1; 1997-456, s. 55.8.)

Editor's Note. — Session Laws 1995, c. 161, s. 1, which amended this section, was effective October 1, 1995, and applicable to estates of decedents dying on or after that date.

Effect of Amendments. — The 1997 amendment, effective August 29, 1997, inserted "or" at the end of subdivision (a)(4).

CASE NOTES

A testator is not required to mention by name or make some provision for a child in order to disinherit that child under North Carolina law, even if the child is born or adopted after the will is made. Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985).

Adequacy of Provision for After-Born Child. —

As long as a testator makes some provision in the will for an after-born child, whether adequate or not, the child has no right to take an intestate share of the testator's estate, and a class gift constituted a provision for an afterborn child, even though the gift was contingent. Mason v. Stanimer, 102 N.C. App. 673, 403 S.E.2d 605 (1991).

§ 31-5.8. Revival of revoked will.

No will or any part thereof that has been in any manner revoked can, except as provided in G.S. 31-5.4, be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10; 1991, c. 587, s. 2.)

ARTICLE 3.

Witnesses to Will.

§ 31-8.1. Who may witness.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

§ 31-10. Beneficiary competent witness; when interest rendered void.

CASE NOTES

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

Jurisdiction of Clerk. — The clerk of the superior court has exclusive and original jurisdiction over the probate of wills. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-18.1. Manner of probate of attested written will.

CASE NOTES

For a will to be admitted to probate, subdivision (a)(1) of this section requires that the will meet the requirements of § 31-3.3 and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

§ 31-18.2. Manner of probate of holographic will.

CASE NOTES

Indicia of Holographic Will Held Sufficient. — Where caveators presented testimony that holographic writings were found among papers which included the titles to testator's car and housetrailer, copies of property deeds, health insurance papers, and cancelled bank notes, further testimony that testator duly executed his signature on the writings before a notary public, and the testimony of three witnesses who testified they were familiar with both the handwriting and signature of the testator and that they believed the subject writings and signatures to be in testator's own hand, caveators presented sufficient indicia of a holographic will under section 31-3.4 and they satisfied the requirements of this section; therefore, propounders' motion for directed verdict was properly denied. In re Will of Penley, 95 N.C. App. 655, 383 S.E.2d 385, cert. denied, 326 N.C. 48, 389 S.E.2d 93 (1990).

§ 31-23: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-24. Examination of witnesses by affidavit.

(a) The examination of witnesses to a will may be taken and subscribed in the form of an affidavit before a notary public or other person who is authorized to administer oaths in the jurisdiction where the examination is held.

(b) A photographic copy of the original will certified to be a true and exact copy thereof by the clerk of superior court of the county in which the will is to be probated may be used in the examination of the witnesses in the procedures set out in subsection (a); provided, the said clerk has in his possession the original will at the time of examination of the witnesses.

(c) Affidavits taken in accordance with subsection (a) shall be transmitted by the person taking the affidavit to the clerk of superior court of the county in which the will is to be probated.

(d) Testimony submitted in accordance with subsection (a) is competent in regard to all requirements of G.S. 31-3.3 and to establish that a will was executed in compliance with the requirements of G.S. 31-3.3.

(e) Nothing in this section is to limit or otherwise affect the authority of a clerk of superior court in the exercise of his authority as judge of probate under G.S. 28A-2-1 to:

(1) Issue subpoenas under G.S. 7A-103; or

(2) Order the taking of depositions of witnesses. (1917, c. 183; C.S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A; 1979, c. 226, s. 1; 1987, c. 78, s. 2.)

§§ 31-25, 31-25.1: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-27. Certified copy of will of nonresident recorded.

(a) Subject to the provisions of subsection (b), if the will of a citizen or subject of another state or country is probated in accordance with the laws of that jurisdiction and a duly certified copy of the will and the probate proceedings are produced before a clerk of superior court of any county wherein the testator had property, the copy of the will shall be probated as if it were the original. If the jurisdiction is within the United States, the copy of the will and the probate proceedings shall be certified by the clerk of the court wherein the will was probated. If the jurisdiction is outside the United States, the copy of the will and probate proceedings shall be certified by any ambassador, minister, consul or commercial agent of the United States under his official seal.

(b) For a copy of a will probated under the provisions of subsection (a) to be valid to pass title to or otherwise dispose of real estate in this State, the execution of said will according to the laws of this State must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate, from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise in such certified copy of the will and probate proceedings.

(c) If the execution of the will in accordance with the laws of this State does not appear as required by subsection (b), the clerk before whom the copy is exhibited shall have power to take proof as prescribed in G.S. 31-24, and the will may be adjudged duly proved, and if so proved, the will shall be recorded as herein provided.

(d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C.C.P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C.S., s. 4152; 1941, c. 381; 1965, c. 995; 1987, c. 78, s. 3.)

CASE NOTES

Applied in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

§ 31-30. Validation of wills recorded without probate by subscribing witnesses.

In all cases where wills and testaments were executed prior to the first day of January, 1875, and which appear as recorded in the record of last wills and testaments to have had two or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this State prior to the first day of January, 1888, without having been duly proven as provided by law, and such wills were presented to the clerk of the superior court in any county in this State where the makers of said wills owned property, and where the makers of such wills lived and died, and were by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies or certified true copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two subscribing witnesses thereto in the manner provided by law of this State. Nothing herein shall be construed to prevent such wills from being impeached for fraud. (1921, c. 66; C.S., s. 4157(a); 1997-81, s. 3.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added "or certified true copies" following "or exemplified copies".

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. General Consideration.
II. Interested Persons.

I. GENERAL CONSIDERATION.

Filing of a caveat is the customary and statutory procedure, etc. — Questions as to the construction of a will may be brought in a declaratory judgment action; however, there are limitations to the use of a declaratory judgment action. Thus, a caveat proceeding and not declaratory judgment was appropriate to determine the validity of document. Rogel v. Johnson, 114 N.C. App. 239, 441 S.E.2d 558, cert. denied, 336 N.C. 609, 447 S.E.2d 401 (1994).

Superior Court Acquires No Jurisdiction When Purported Caveat Is Fatally Defective from Inception. — Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

The Contest Is a Special Proceeding In Rem. — A caveat is an in rem proceeding, perhaps more strictly so regarded than any other proceeding with which the courts deal. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

The rules peculiar to a caveat stem from the in rem nature of the proceeding. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Nonsuit Cannot Be Taken. — Because the caveat proceeding is in rem, the proceeding must go on until the issue devisavit vel non is appropriately answered; nonsuit cannot be taken by the propounders or the caveators. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Propounder Functions as Plaintiff. — It is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

An attack upon the validity of a will must be direct and in the form of a caveat. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

The trial court may not exclude from the caveat proceeding consideration of any script offered by an interested party which is relevant to the issue devisavit vel non. However, it does not mandate that the issues relating to all scripts be considered simultaneously. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Burden of Proof. — Although a caveat proceeding is an in rem proceeding without a plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Applied in Lash ex rel. Wilson v. Lash, 107 N.C. App. 755, 421 S.E.2d 615 (1992).

II. INTERESTED PERSONS.

This section affords protection to any interested persons who do not receive notice. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Executor. — A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Membership in Congregation. — Membership in a church congregation, albeit distinguished membership, is too tenuous an interest to come within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-33. Bond given and cause transferred to trial docket.

Cross References. — For provisions requiring clerk to transfer issues of fact to civil issue docket, see § 1-273.

CASE NOTES

Court Had No Jurisdiction to Determine Will's Validity Where Plaintiff's Attempt to Initiate Caveat Was Part of Attack on Deed. — Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine question of will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When a purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Clerk's Findings Not Binding When Issue of Fact Raised. — Interested parties in a proceeding before a clerk of the Superior Court to probate a will in solemn form are not bound by the findings of the clerk where an issue of fact is raised by the parties. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Proceedings Transferred, etc. — When a caveat is filed, the clerk of superior court transfers the proceeding to the civil issue docket of the superior court, to the end that the issue devisavit vel non may be tried by a jury. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Caveat filed without compliance with bond requirement under this section is not a valid attack upon the will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Who Are Necessary Parties. — Persons who qualify as persons interested in the estate are not necessarily equivalent to necessary parties. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Discretion of Court as to Necessary Parties. — The decision whether certain persons are necessary parties to the caveat proceeding is within the court's discretion. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Persons who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid are proper persons to receive notice and participate in the proceedings within the meaning of this section. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Beneficiaries Under Previous Will. — Where caveators alleged that probated will was invalid on grounds of undue influence and lack of mental capacity and that they were beneficiaries under a will made at a time when the testator possessed mental capacity, if the facts were as caveators alleged, they were interested in the estate. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Heirs at law who have no knowledge of a caveat proceeding and who were not cited under this section are not estopped to file a second caveat, nor are they bound by the former judgment sustaining the validity of the script. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-34. Prosecution bond required in actions to contest wills.

CASE NOTES

This section is not applicable to a caveator. Therefore, a prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-36. Caveat suspends proceedings under will.

CASE NOTES

Stated in In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643 (1987).

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

CASE NOTES

Cited in In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

§ 31-37.1. Parties may enter into a settlement agreement.

Prior to an entry of judgment by the superior court in a caveat proceeding, the parties may enter into a settlement agreement, whereupon judgment may be entered by the court, without a verdict by a jury, in accordance with the terms of the settlement agreement, either sustaining or setting aside the contested will. (1989 (Reg. Sess., 1990), c. 949, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 949, s. 2 made this section effective October 1, 1990, and applicable to all caveats to wills whether filed on, before or after that date.

Article 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Rules of Construction.
III. Illustrative Cases.

I. GENERAL CONSIDERATION.

The presumption created by this section, etc. —

The rule that a devise of the "use of" property is the equivalent of a devise in fee ... has no application when a will shows an intent to pass an interest that is less than a fee. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Cited in Brinkley v. Day, 88 N.C. App. 101, 362 S.E.2d 587 (1987).

II. RULES OF CONSTRUCTION.

Intention of Testator. —

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

III. ILLUSTRATIVE CASES.

"Cash." — The word "cash" is not such a technical one that it will have the same definite and precise meaning in all circumstances. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

The word "cash" as used in a will includes bank accounts, both checking and savings and includes certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Use of the words "other cash," as used in a will, will not be interpreted by resorting to a narrow, technical definition or interpretation. Courts must look for the meaning of these words according to the subject treated and the context in which they were used. The intention of the testator is the polar star which must guide the courts in the interpretation of wills. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

"Remaining cash and bonds" included certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Language Insufficient to Show Intent to Pass Less Than Fee Simple Estate. —

The language "provided, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children" did not show the intestator's intention to convey a life estate. An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause purporting to dispose of what remains at his death is not allowed to defeat the devise or limit it to a life estate. Leonard v. Dillard, 87 N.C. App. 79, 359 S.E.2d 497 (1987); See Osborne v. Hodgin, 98 N.C. App. 111, 389 S.E.2d 629 (1990).

Devise Creating Life Estate. — Decedent's unrestricted devise of certain property to plaintiff in Item 2 was a devise in fee simple and the later devise of the property to defendants in Item 7 did not limit plaintiff's estate to a life estate. Coble v. Patterson, 114 N.C. App. 447, 442 S.E.2d 119 (1994).

§ 31-40. What property passes by will.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

§ 31-41. Will relates to death of testator.

CASE NOTES

Agreement to Sell Made Before Testator's Death. — Devise in will was not adeemed because of agreement to sell made before death when at the time of the testator's death, he retained legal title to the real estate. Morrison v. Grandy, 115 N.C. App. 170, 443 S.E.2d 751 (1994).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

(a) Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue. The qualified issue shall take pursuant to the preceding sentence regardless of whether or not the deceased person dies before or after the making of the will. Where a devise or legacy of any interest in property is given to a person as a member of a class and the person predeceases the testator and is not survived by qualified issue, then, unless a contrary intent is indicated by the will, the entire interest of such person shall devolve upon the members of the class who survived the testator and the qualified issue of any members of the class who predeceased the testator, taking by substitution as herein provided.

(b) The term "qualified issue" as used in subsection (a) means issue of the deceased person who would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

(c) If subsection (a) is not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:

a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or

b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

(d) Renunciation of a devise or legacy shall be as provided for in Chapter 31B of the General Statutes. (1844, c. 88, s. 4; R.C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C.S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1; 1975, c. 371, s. 3; 1979, c. 525, s. 5; 1987, c. 86, ss. 1, 2; 1989, c. 244.)

Editor's Note. —

Session Laws 1989, c. 244, which added the last sentence of subsection (a), in s. 2 provides that the amendment is applicable to the will of any person dying on or after that date.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

I. General Consideration.
II. Property Passing Under Residuary Clause.
III. Devise or Legacy to Testator's Slayer.

I. GENERAL CONSIDERATION.

This section applies to all wills and provides means by which property is to be distributed in the event of failure of devises and legacies by lapse or otherwise. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Anti-lapse statute did not apply to case regarding distribution of proceeds from annuity contract. Hager v. Lincoln Nat'l Life Ins. Co., — N.C. App. —, 484 S.E.2d 828 (1997).

Intent to Prevent Lapse. — Should the testator desire to prevent lapse, he must express his intent that the gift not lapse or must provide for substitution of another devisee to receive the gift. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

Had testator intended the anti-lapse statute not to apply, he could have very easily shown such contrary intent, and it was not for the court to do that for him. Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Lapse Would Cause Impermissible Rewriting of the Will. — To conclude from the survivor language of testator's will that his intent was to favor the children of the brother who lived longest over the children of the brother who died first was an impermissible rewriting of the will rather than a construction of what was contained within the four corners of the document. Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Applied in North Carolina Nat'l Bank v. Apple, 95 N.C. App. 606, 383 S.E.2d 438 (1989).

Stated in Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Cited in McMillan v. Davis, 81 N.C. App. 433, 344 S.E.2d 595 (1986); In re Estate of Baumann, 93 N.C. App. 782, 379 S.E.2d 107 (1989).

II. PROPERTY PASSING UNDER RESIDUARY CLAUSE.

Construction of Residuary Clause, etc. —

No particular mode of expression is needed to constitute a residuary clause. All that is required is an adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the will. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Construction to Prevent Intestacy. —

It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

When the language of the will is definite and clear, the presumption that the will must be construed to prevent partial intestacy is generally not employed. If the language is unambiguous, then there is no need to resort to a construction of the will, and the expression of the testator must be given effect. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Applicability of Subdivision (c)(1)a. — Where it is clear from the residuary clause itself or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away should not fall into the residue, subdivision (c)(1)a does not apply. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Heirs who partake of a devise pursuant to this section are entitled to a share of a lapsed residuary gift; if the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue may also have participated in this lapsed gift. In re Will of Hubner, 105 N.C. App. 599, 414 S.E.2d 369 (1992).

Language disposing of property "not expressly disposed of by other provisions of the will" was a residuary clause and the decision concerning the taking of the lapsed share was controlled by *In re Will of Huber*, 106 N.C. App. 204, 416 S.E.2d 401 (1992). Moore v. Stern, 122 N.C. App. 270, 468 S.E.2d 607 (1996).

Devise of Lapsed Residuary Gift. — Heirs who partake of a devise pursuant to the anti-lapse statute are entitled to a share of a lapsed residuary gift. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

Where residuary legatees would have taken a share of a lapsed gift had they survived, their daughters, who were qualified issue, could take the entire share to which residuary legatees would have taken had they survived. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

III. DEVISE OR LEGACY TO TESTATOR'S SLAYER.

Subsection (a) Rather Than Subdivision (c)(2) Applies. — If the court were to hold that subdivision (c)(2) of this section applies merely because the slayer does not, in fact, predecease the slain, the court would be ignoring the legislative scheme intended by the statutory presumption of the slayer's death. Moreover, subsection (c) expressly states that that subsection applies only if subsection (a) is not applicable, thus making subsection (a) the dominant or controlling statute. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption in § 31A-4(3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in § 31A-4(3) be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Distributed in Accord with Subsection (a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with subsection (a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with subsection (a). Because of the conclusive presumption in § 31A-4(3) that the slayer predeceased the testator, subsection (a), not subdivision (c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-43. General gift by will an execution of power of appointment.

Legal Periodicals. —

For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

Purpose of Section. —

In accord with the main volume. See First Citizens' Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Residuary Devise, etc. —

A power of appointment upon which no restrictions are imposed is exercised by a residuary clause. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Chapter 31A.

Acts Barring Property Rights.

Article 3.

Willful and Unlawful Killing of Decedent.

Sec.
31A-11. Insurance benefits.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

CASE NOTES

Legislative Intent. — The apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Presumption of Adultery. — Adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Wife's Behavior as Inference of Adultery. — A married woman's refusal to testify about the nature of her relationship with two unmarried men, with whom she admitted cohabiting, and her failure to refute the charge of adultery logically gave rise to an inference of adultery. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Subdivision (b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Proceeding to set aside invalid divorce decree is not barred by death of one of the spouses where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Cited in In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990); Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

CASE NOTES

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Abandonment has been defined as

willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Or Wrongful Death Proceeds. — In accord with first paragraph in the main volume. See Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

This Article, the "slayer statute," applies only to felonious killings; it does not prevent the common law doctrine that no person will be allowed to profit from his own wrong from being applied in actions not under its provisions. In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

Failure to Proceed Within One Year. — Plaintiff's failure to proceed under the slayer statute within one year did not bar him from attempting to show that intestate's culpable negligence proximately contributed to the deaths of the decedents and that her estate could not profit from those wrongs. Lynch v. Newsom, 96 N.C. App. 53, 384 S.E.2d 284, cert. denied, 326 N.C. 48, 389 S.E.2d 90 (1990).

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985).

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

CASE NOTES

Presumption in Subdivision (3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in subdivision (3) of this section be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Slayer's Legacy Distributed in Accord with § 31-42(a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with § 31-42(a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Order of Death Not Established for Purposes of Distributing Slayer's Estate. — The clause in this section which deems the slayer to have predeceased the victim does not establish the order of death between the slayer and the victim for purposes of distributing the slayer's estate. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Does Not Authorize Victim's Participation in Estate. — The plain language of this section clearly bars the slayer from participating in the victim's estate; however, it does not authorize the victim to participate in the slayer's estate; that may or may not occur. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Merely Establishes Presumption to Exclude Slayer. — This section does not indulge the fiction that the slayer's date of death is other than the actual date of death, but merely establishes a presumption to exclude the slayer. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with § 31-42(a). Because of the conclusive presumption in subdivision (3) of this section that the slayer predeceased the testator, § 31-42(a), not § 31-42(c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Cited in State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

§ 31A-11. Insurance benefits.

(a) Insurance and annuity proceeds payable to the slayer:

(1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or

(2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent. If no alternate beneficiary is named, insurance and annuity proceeds shall be paid into the estate of the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this Chapter. (1961, c. 210, s. 1; 1989, c. 485, s. 3.)

Editor's Note. — Session Laws 1989, c. 485, s. 67 is a severability clause.

§ 31A-12. Persons acquiring from slayer protected.

CASE NOTES

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Cited in In re Trogdon, 101 N.C. App. 323, 399 S.E.2d 396 (1991).

Chapter 32.

Fiduciaries.

Article 2.

Security Transfers.

Sec.
32-14 through 32-24. [Repealed.]

Sec.
32-27. Powers which may be incorporated by reference in trust instrument.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-9. Deposit in name of principal.

CASE NOTES

What Constitutes "Bad Faith." — Bank's violation of this section of the Uniform Fiduciaries Act was held not to constitute an unfair or deceptive trade practice where the breach of fiduciary duty was committed by a trustee, and there was an absence of actual knowledge or bad faith by the bank. Moretz v. Miller, — N.C. App. —, 486 S.E.2d 85 (1997).

ARTICLE 2.

Security Transfers.

§§ 32-14 through 32-24: Repealed by Session Laws 1997-181, s. 23, effective October 1, 1997.

ARTICLE 3.

Powers of Fiduciaries.

§ 32-25. Definition.

CASE NOTES

Cited in Melvin v. Home Fed. Sav. & Loan Ass'n, 125 N.C. App. 660, 482 S.E.2d 6 (1997).

§ 32-27. Powers which may be incorporated by reference in trust instrument.

The following powers may be incorporated by reference as provided in G.S. 32-26:

(1) Retain Original Property. — To retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would

not be appropriate for the fiduciary apart from this provision.

(2) Sell and Exchange Property. — To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.

(3) Invest and Reinvest. — To invest and reinvest, as the fiduciary shall deem advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in such property as the fiduciary shall deem advisable, even though such investment shall not be of the character approved by applicable law but for this provision.

(4) Invest without Diversification. — To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.

(5) Continue Business. — To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute thereto or invest therein additional capital or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(6) Form Corporation or Other Entity. — To form a corporation or other entity and to transfer, assign, and convey to such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such stock and securities and obligations.

(7) Operate Farm. — To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things deemed advisable by the fiduciary in the management and maintenance of such farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including but not limited to the following powers:

a. To operate the farm with hired labor, tenants or sharecroppers;

b. To lease or rent the farm for cash or for a share of the crops;

c. To purchase or otherwise acquire farm machinery and equipment and livestock;

d. To construct, repair, and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;

e. To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery or equipment or livestock;

f. To employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil;

g. To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;

h. To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;

i. To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such operations;

j. To market the products of the farm; and

k. In general, to employ good husbandry in the farming operation.

(8) Manage Real Property. —

a. To improve, manage, protect, and subdivide any real property;

b. To dedicate or withdraw from dedication parks, streets, highways, or alleys;

c. To terminate any subdivision or part thereof;

d. To borrow money for the purposes authorized by this subdivision for such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber any such property or part thereof, whether in possession or reversion;

e. To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary deems advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved;

f. To make gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which such property lies;

g. To manage and improve timber and forests on such property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;

h. To modify, renew or extend leases;

i. To employ agents to rent and collect rents;

j. To create easements and release, convey, or assign any right, title, or interest with respect to any easement on such property or part thereof;

k. To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement in whole or in part; and

l. To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (8).

(8a) Comply with environmental law. —

a. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to any actual or threatened violation of any environmental law affecting property held by the fiduciary;

b. To take, on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

c. To refuse to accept property in trust if the fiduciary determines that any property to be donated to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

d. To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

e. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

f. To decline to serve as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

g. For purposes of this subsection "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this subsection, "hazardous substances" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law. The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect property shall be deemed to create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

(9) Pay Taxes and Expenses. — To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.

(10) Receive Additional Property. — To receive additional property from any source and administer such additional property as a portion of the appropriate trust or estate under the management of the fiduciary; provided the fiduciary shall not be required to receive such property without the fiduciary's consent.

(11) Deal with Other Trusts. — In dealing with one or more fiduciaries:

a. To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his spouse or any child of his shall have created, for such estates and upon such terms and conditions as to sale price, terms of payment, and security as to the fiduciary shall seem advisable; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and

b. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary shall deem advisable from any trust created by the decedent, his spouse, or any child of his, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.

(12) Borrow Money. — To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes, or other charges against the estate or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans; and to renew existing loans either as maker or endorser.

(13) Make Advances. — To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary shall have a lien on the assets of the trust or estate as against a beneficiary.

(14) Vote Shares. — To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited, or general proxy, with or without power of substitution.

(15) Register in Name of Nominee. — To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary shall be liable for any act of the nominee in connection with the stock so held.

(16) Exercise Options, Rights, and Privileges. — To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold such stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable.

(17) Participate in Reorganizations. — To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan

agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to any such plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of such plan.

(18) Reduce Interest Rates. — To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.

(19) Renew and Extend Obligations. — To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of such continuance.

(20) Foreclose and Bid in. — To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(21) Insure. — To carry such insurance coverage, including public liability, for such hazards and in such amounts, either in stock companies or in mutual companies, as the fiduciary shall deem advisable.

(22) Collect. — To collect, receive, and receipt for rents, issues, profits, and income of an estate or trust.

(23) Litigate, Compromise or Abandon. — To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by such persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries of the estate or trust.

(24) Employ and Compensate Agents, etc. — To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of such agent or representative provided he was selected and retained with due care on the part of the fiduciary.

(25) Acquire and Hold Property of Two or More Trusts Undivided. — To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division shall become necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropri-

ate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that the provisions of this subdivision shall not defer the vesting in possession of any share or part of share of the estate or trust.

(25a) Divide One Trust into Several Trusts and Make Distributions From Those Trusts. — To divide the funds and properties constituting any trusts into two or more identical separate trusts that represent two or more fractional shares of the funds and properties being divided, and to make distributions of income and principal by a method other than pro rata from the separate trusts so created as the fiduciary determines to be in the best interests of the trust beneficiaries. In any case where a single trust has been divided by the fiduciary into two separate trusts, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the fiduciary may thereafter, to the extent possible consistent with the terms of the governing instrument, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy such distributions from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

(25b) Consolidate Similar Trusts. — When the trustee is trustee of more than one trust, the terms of which are substantially similar and the beneficiaries of which are identical, to consolidate the assets of those trusts and administer the assets as one trust under the terms of one of the trusts.

(26) Establish and Maintain Reserves. — To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries; provided, however, that the provisions of this subdivision shall not affect the ultimate interests of beneficiaries in such reserves.

(27) Distribute in Cash or Kind. — To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, either pro rata or by a method other than pro rata among all distributees, without regard to the income tax basis or other special tax attributes of such assets, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there be more than one distributee thereof, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable; provided, however, that the fiduciary shall not exercise any power under this subdivision unless the fidu-

ciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.

(28) Pay to or for Minors or Incompetents. — To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

a. Directly to such minor or incompetent;

b. To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;

c. To the legal or natural guardian of such minor or incompetent;

d. To any other person, whether or not appointed guardian of the person by any court, who shall, in fact, have the care and custody of the person of such minor or incompetent.

The fiduciary shall not be under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom such payments were made; and the receipt of such person shall be full acquittance to the fiduciary.

(28a) Pay to Custodian Under Uniform Gifts or Transfers to Minors Act. — To make any distribution of income or principal, including real property, for the benefit of any distributee to a custodian under the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes, or under the provisions of any similar statute in the state where the minor or the custodian resides. Unless a custodian is specifically named in the governing instrument, the fiduciary shall have absolute discretion to nominate any qualified individual or financial institution, including the fiduciary, to serve as custodian, and to nominate one or more substitute custodians.

(29) Apportion and Allocate Receipts and Expenses. — Where not otherwise provided by the Principal and Income Act of 1973, as contained in Chapter 37 of the General Statutes, to determine:

a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(30) Make Contracts and Execute Instruments. — To make contracts and to execute instruments, under seal or other-

wise, as may be necessary in the exercise of the powers herein granted.

(31) The foregoing powers shall be limited as follows for any trust which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) or nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (but only to the extent that section 508(e) of the code is applicable to such nonexempt split-interest trust under section 4947(a)(2)):

a. The fiduciary shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

b. No fiduciary shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

c. No fiduciary shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

d. No fiduciary shall make any investments in such manner as to subject the trust to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

e. No fiduciary shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1965, c. 628, s. 1; 1967, c. 24, s. 15; c. 956; 1971, c. 1136, s. 3; 1977, c. 30; 1989, c. 652, s. 20; 1991, c. 192, s. 1; 1995, c. 235, ss. 1-3; 1997-456, s. 27.)

Editor's Note. — Subdivisions (8.1), (25.1), (25.2), and (28.1) of this section were renumbered as subsections (8a), (25a), (25b), and (28a), respectively, pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Chapter 32A.

Powers of Attorney.

Article 2A.

Authority of Attorney-In-Fact to Make Gifts.

Sec.
32A-14.2 through 32A-14.9. [Reserved.]

ARTICLE 1.

Statutory Short Form Power of Attorney.

§ 32A-1. Statutory Short Form of General Power of Attorney.

CASE NOTES

Power to Make Gifts of Property. — Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power of attorney set forth in this section and the powers granted attorneys-in-fact by § 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

The basic premise behind the majority rule that a general power of attorney does not include authority to make gifts of property, is that an attorney-in-fact is presumed to act in the best interests of the principal. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power to Make Gift of Real Property Conferred. — Where power of attorney executed by decedent went beyond the short form and expressly provided that attorney-in-fact's powers were to include the power to transfer real estate, the document did expressly confer upon the attorney-in-fact the power to make a gift of real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

§ 32A-2. Powers conferred by the Statutory Short Form Power of Attorney set out in G.S. 32A-1.

CASE NOTES

Gifts of Real Property. — The legislature did not intend to include the power to give a gift of real property under this statute. Whitford v. Gaskill, 119 N.C. App. 790, 460 S.E.2d 346 (1995).

The power to give a gift of real property must be expressly conferred; general language of the power to transfer, along with the statutory form, will not suffice. Whitford v. Gaskill, 119 N.C. App. 790, 460 S.E.2d 346 (1995).

Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power of attorney set forth in § 32A-1 and the powers granted attorneys-in-fact by subsection (1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

The basic premise behind the majority rule that a general power of attorney does not include authority to make gifts of property, is that an attorney-in-fact is presumed to act in the best interests of the principal. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power to Make Gift of Real Property Conferred. — Where power of attorney executed by decedent went beyond the short form and expressly provided that attorney-in-fact's powers were to include the power to transfer real estate, the document did expressly confer upon the attorney-in-fact the power to make a gift of real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

ARTICLE 2A.

Authority of Attorney-In-Fact to Make Gifts.

§§ 32A-14.2 through 32A-14.9: Reserved for future codification purposes.

Chapter 33A.

North Carolina Uniform Transfers to Minors Act.

Sec.
33A-9. Manner of creating custodial property and effecting transfer; designation of initial custodian; control.

§ 33A-1. Definitions.

Legal Periodicals. — For note discussing the Uniform Transfers to Minors Act, see 66 N.C.L. Rev. 1349 (1988).

§ 33A-9. Manner of creating custodial property and effecting transfer; designation of initial custodian; control.

(a) Custodial property is created and a transfer is made whenever:

(1) An uncertificated security or a certificated security in registered form is either:
  a. Registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or
  b. Delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially the form set forth in subsection (b);

(2) Money is paid or delivered, or a security held in the name of a broker, financial institution, or its nominee is transferred, to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(3) The ownership of a life or endowment insurance policy or annuity contract is either:
  a. Registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or
  b. Assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(4) An irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a con-

tract is the subject of a written notification delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(5) An interest in real property is conveyed or devised to the transferor, an adult other than the transferor, or a trust company, whose name in the conveyance is followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(6) A certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

  a. Issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

  b. Delivered to an adult other than the transferor or to a trust company, endorsed to that person followed in substance by the words: "as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

(7) An interest in any property not described in paragraphs (1) through (6) is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in subsection (b).

(b) An instrument in the following form satisfies the requirements of paragraphs (1)(ii) and (7) of subsection (a):

TRANSFER UNDER THE NORTH CAROLINA UNIFORM TRANSFERS TO MINORS ACT

I, __________ (name of transferor or name and representative capacity if a fiduciary) hereby transfer to __________ (name of custodian), as custodian for __________ (name of minor) under the North Carolina Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated: ____________________

____

(Signature)

____________________ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the North Carolina Uniform Transfers to Minors Act.

Dated: ____________________

____

(Signature of Custodian)

(c) A transferor shall place the custodian in control of the custodial property as soon as practicable. (1987, c. 563, s. 2; 1997-456, s. 27.)

Editor's Note. — Subdivisions (a)(1)(i) and (ii), (a)(3)(i) and (ii), and (a)(6)(i) and (ii) of this section were renumbered as subdivisions (a)(1)a. and b., (a)(3)a. and b., and (a)(6)a. and b., respectively, pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Chapter 34.

Veterans' Guardianship Act.

Sec.
34-2.1. Guardian's powers as to property; validation of prior acts.
34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.
34-13. Investment of funds.
34-16. [Repealed.]

§ 34-2.1. Guardian's powers as to property; validation of prior acts.

Any guardian appointed under the provisions of this Chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A of the General Statutes, and the provisions of such Chapter concerning the custody, management and disposal of property shall apply in any case not provided for by this Chapter. All acts heretofore performed by guardians appointed under the provisions of this Chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this Chapter, if such acts were performed under and in conformity with the provisions of Chapter 35A of the General Statutes. (1955, c. 1272, s. 1; 1987, c. 550, s. 18.)

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

It shall be unlawful for any person, other than a public guardian qualified under Article 11, Chapter 35A, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1; 1987, c. 550, s. 19.)

§ 34-13. Investment of funds.

Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.

(2) State of North Carolina bonds issued since the year 1872.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under the seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, Chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) Any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(5) Repealed by Session Laws 1979, c. 467, s. 22.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9; 1979, c. 467, s. 22; 1993, c. 539, s. 401; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 401, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 34-14.1. Payment of veterans' benefits to relatives.

CASE NOTES

Cited in Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 34-16: Repealed by Session Laws 1985, c. 589, s. 14, effective January 1, 1986.

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1.

Determination of Incompetence.

Sec.

35A-1101. Definitions.
35A-1105. Petition before clerk.
35A-1116. Costs and fees.

SUBCHAPTER II. GUARDIAN AND WARD.

Article 4.

Purpose and Scope; Jurisdiction; Venue.

35A-1202. Definitions.

Article 5.

Appointment of Guardian for Incompetent Person.

Sec.

35A-1216. Rule-making power of Secretary of Health and Human Services.

Article 6.

Appointment of Guardian for a Minor.

35A-1221. Application before clerk.

Article 7.

Guardian's Bond.

35A-1239. Health and Human Services bond.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

ARTICLE 1.

Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this Subchapter:

(1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.

(2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.

(3) "Clerk" means the clerk of superior court.

(4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the

brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.

(6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

(8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.

(9) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.

(10) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.

(11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate.

(12) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity".

(13) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.

(14) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(15) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.

(16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.

(17) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11; 1997-443, s. 11A.11.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, rewrote this section.

CASE NOTES

Quoted in Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996); Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Applied in Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997).

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human services agency through its authorized representative. (1987, c. 550, s. 1; 1989, c. 473, s. 22; 1997-443, s. 11A.12.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "services" for "resources."

§ 35A-1112. Hearing on petition; adjudication order.

CASE NOTES

Cited in Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

§ 35A-1116. Costs and fees.

(a) Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:

(1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or
(2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).

(b) The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:
(1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;
(2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Health and Human Services;
(3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Health and Human Services, in the discretion of the court.

(c) Witness fees and the fees of court-appointed counsel or guardian ad litem shall be paid by:
(1) The respondent, if the respondent is adjudicated incompetent and is not indigent;
(2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;
(3) The Administrative Office of the Courts in all other cases.

(d) The provisions of this section shall also apply to all parties to any proceedings under this Chapter, including a guardian who has been removed from office and the sureties on the guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1202. Definitions.

When used in this Subchapter, unless a contrary intent is indicated or the context requires otherwise:
(1) "Accounting" means the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.
(2) "Clerk" means the clerk of superior court.
(3) "Designated agency" means the State or local human services agency designated by the clerk in an order to prepare,

cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(4) "Disinterested public agent" means:

a. The director or assistant directors of a local human services agency, or

b. An adult officer, agent, or employee of a State human services agency.

The fact that a disinterested public agent is employed by a State or local human services agency that provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian.

(5) "Estate" means any interest in real property, choses in action, intangible personal property, and tangible personal property, and includes any interest in joint accounts or jointly held property.

(6) "Financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of the ward's money, sale of the ward's property, or other transactions involving the ward's property.

(7) "General guardian" means a guardian of both the estate and the person.

(8) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(9) "Guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.

(10) "Guardian of the person" means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

(11) "Incompetent person" means a person who has been adjudicated to be an "incompetent adult" or "incompetent child" as defined in G.S. 35A-1101(7) or (8).

(12) "Minor" means a person who is under the age of 18, is not married, and has not been legally emancipated.

(13) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(14) "Status report" means the report required by G.S. 35A-1242 to be filed by the general guardian or guardian of the person. A status report shall include a report of a recent

medical and dental examination of the ward by one or more physicians or dentists, a report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the guardian, and a report on the ward's condition, needs, and development. The clerk may direct that the report contain other or different information. The report may also contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department of Health and Human Services, or any other interested persons including, if applicable to the ward's situation, group home parents or supervisors, employers, members of the staff of a treatment facility, or foster parents.

(15) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1997-443, s. 11A.13.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "services" for "resources" throughout the section; deleted "The term" from the beginning of each of the subdivisions; substituted "Health and Human Services" for "Human Resources" in subdivision (14); and made stylistic changes.

§ 35A-1203. Jurisdiction; authority of clerk.

OPINIONS OF ATTORNEY GENERAL

Clerk of Court as "Court of Competent Jurisdiction." — If a purchaser or beneficiary of a preneed contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and, a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Article 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1216. Rule-making power of Secretary of Health and Human Services.

The Secretary of the Department of Health and Human Services shall adopt rules concerning the gardianship responsibilities of disinterested public agents. The rules shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. (1987, c. 550, s. 1; 1997-443, s. 11A.15.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in the catchline, substituted "Health and Human Services shall adopt rules concerning" for "Human Resources shall issue rules and regulations for the implementation of", and deleted "and regulations" preceding "shall provide."

ARTICLE 6.

Appointment of Guardian for a Minor.

§ 35A-1221. Application before clerk.

Any person or corporation, including any State or local human services agency through its authorized representative, may make application for the appointment of a guardian of the estate for any minor or for the appointment of a guardian of the person or general guardian for any minor who has no natural guardian by filing an application with the clerk. The application shall set forth, to the extent known:

(1) The minor's name, date of birth, address, and county of residence;

(2) The names and address of the minor's parents, if living, and of other persons known to have an interest in the application for appointment of a guardian; the name of and date of death of the minor's deceased parent or parents;

(3) The applicant's name, address, county of residence, relationship if any to the minor, and interest in the proceeding;

(4) If a guardian has been appointed for the minor or custody of the minor has been awarded, a statement of the facts relating thereto and a copy of any guardianship or custody order, if available;

(5) A general statement of the minor's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled;

(6) A statement of the reason or reasons that the appointment of a guardian is sought; whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian; and whom the applicant recommends or seeks to have appointed as such guardian or guardians; and

(7) Any other information that will assist the clerk in determining the need for a guardian or in appointing a guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 24; 1997-443, s. 11A.16.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "services" for "resources" in the first paragraph.

ARTICLE 7.

Guardian's Bond.

§ 35A-1239. Health and Human Services bond.

The Secretary of the Department of Health and Human Services shall require or purchase individual or blanket bonds for all disinterested public agents appointed to be guardians, whether they serve as guardians of the estate, guardians of the person, or general guardians, or one blanket bond covering all agents, the bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State. (1987, c. 550, s. 1; 1997-443, s. 11A.17.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in the catchline and in the first sentence; substituted "shall require or purchase" for "shall require, or purchase, in such amounts as he deems adequate and proper"; and made a stylistic change.

Chapter 36A.

Trusts and Trustees.

Article 5.

Uniform Trusts Act.

Sec.
36A-70. Trustees holding stock or other securities in name of nominee.

ARTICLE 5.

Uniform Trusts Act.

§ 36A-70. Trustees holding stock or other securities in name of nominee.

A trustee may hold shares of stock or other securities in the name of a nominee, without mention of the trust relationship in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

(1) The records and all reports or accounts rendered by the trustee clearly show the ownership of the stock or other securities by the trustee and the facts regarding its holdings, and

(2) The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the trustee or when such securities are deposited by the fiduciary in a clearing corporation as defined in G.S. 25-8-102.

The trustee shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such had done such acts or been guilty of such omissions. (1939, c. 197, s. 9; 1945, c. 292; 1973, c. 144; c. 497, s. 1; 1975, c. 121; 1977, c. 502, s. 2; 1997-181, s. 24.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and not affecting actions or proceedings commenced before that date, substituted "G.S. 25-8-102" for "G.S. 25-8-102(3)" in subdivision (2).

§ 36A-78. Power of settlor.

CASE NOTES

Cited in Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997).

Article 14.

Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots.

§ 36A-145. Honorary trusts.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 36A-146. Trusts for cemetery lots.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 36A-147. Trusts for pets.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 36A-148. Termination of small trusts.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

Chapter 36B.

Uniform Management of Institutional Funds Act.

Sec.
36B-1. Definitions.

§ 36B-1. Definitions.

As used in this Chapter, the following terms have the meanings specified:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution, unless the fund is held exclusively for the benefit of either a community foundation or community trust, deemed to be "publicly supported" under the Code, as defined in G.S. 105-134.1(*l*), and held by:

a. A bank;
b. A trust company; or
c. Another fiduciary

that is a trustee of the community foundation or community trust or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund or (iii) funds other than endowment funds held by a governmental organization;

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, trust, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. (1985, c. 98, s. 1; 1991, c. 39, s. 1.)

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Only Question Is Location of True Dividing Line. — Where the only issue to be determined is the location of a dividing line between two parcels of land, the appropriate action is a processioning proceeding as provided by this section; however, in the event title to the land is put in issue, the Clerk may not hear the case, but must transfer it to the Superior Court where it becomes, in effect, an action to quiet title pursuant to § 41-10. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to § 41-10. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter, "the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985).

Cited in Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

§ 38-3. Procedure.

CASE NOTES

Parties to Proceeding. — All landowners whose land adjoins the disputed boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, although they may be joined in the discretion of the trial judge. Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Failure to Comply with Subsection (c) Not Fatal. — Trial court correctly found that the prior judgment was res judicata as to the location of boundary line despite the fact the court did not issue an order to the surveyor to run and mark the boundary lines; although the trial court may not have totally complied with this section, the court strictly observed the statutory provisions in all material respects. Tindall v. Willis, 95 N.C. App. 374, 382 S.E.2d 778 (1989).

Cited in Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the pertinent statute, does not require the court to do so. Young v. Young, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Chapter 39.

Conveyances.

Article 1.

Construction and Sufficiency.

Sec.
39-6.4. Creation of easements, restrictions, and conditions.

Article 3.

Fraudulent Conveyances.

39-15 through 39-23. [Repealed.]

Article 3A.

Uniform Fraudulent Transfer Act.

39-23.1. Definitions.
39-23.2. Insolvency.
39-23.3. Value.
39-23.4. Transfers fraudulent as to present and future creditors.
39-23.5. Transfers fraudulent as to present creditors.
39-23.6. When transfer is made or obligation is incurred.
39-23.7. Remedies of creditors.
Sec.
39-23.8. Defenses, liability, and protection of transferee.
39-23.9. Extinguishment of cause of action.
39-23.10. Supplementary provisions.
39-23.11. Uniformity of application and construction.
39-23.12. Short title.

Article 5A.

Control Corners in Real Estate Developments.

39-32.3. Recordation of plat showing control corners.

Article 8.

Business Trusts.

39-48, 39-49. [Reserved.]

Article 9.

Disclosure.

39-50. Death or illness of previous occupant.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Legal Periodicals. —
For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Conflicting Clauses.

I. GENERAL CONSIDERATION.

Cited in Atlas Fire Apparatus, Inc. v. Beaver, 56 Bankr. 927 (Bankr. E.D.N.C. 1986); International Paper Co. v. Hufhum, 81 N.C. App. 606, 345 S.E.2d 231 (1986).

II. CONFLICTING CLAUSES.

Conflict Between Granting Clause and Habendum. —
In event of any repugnancy between granting clause and preceding or succeeding recitals, granting clause will pre-

vail. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Legislative Intent. — When the legislature passed this section, it was their primary intention to abolish past rules of construction which required courts to disregard certain clauses if they contradicted the granting clause of a deed. Instead, for conveyances executed after 1 January 1968, the courts would, under this section, consider equally all clauses in a deed when as the intent of parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Construction of Conveyances Executed Prior to January 1, 1968. — Deeds executed prior to January 1, 1968, are to be construed according to common law rules, as opposed to the statutory rule of construction found in subsection (a) of this section. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573, cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Deed is to be construed by the court, and meaning of its terms is question of law, not of fact. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

The meaning of the terms of the deed is a question of law, not of fact. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Intent of Parties to Be Determined by Judge. — In light of the purpose of subsection (a) of this section, the statute's requirement that "the courts" interpret the deed did not change the traditional rule that it is the judge's role to determine the intent of the parties. It was not the legislature's intent to change *who* interprets the intent of the parties in a deed; rather, the statute was an effort by the legislature to state *how* "the courts" should interpret the deed. Therefore, under the statute it is the judge's role to determine the intent of the parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Court Has Power to Determine Intent But Not Issues of Fact. — Generally, where there is no waiver of jury trial or agreement as to facts nor evidence offered, the court is without power to decide a controverted issue of fact raised by the pleadings. However, ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Ascertaining Intent of Parties. — In some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. Intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time; the tendency of the modern decisions is to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining, in the manner indicated the intention of the parties; where trial judge chose not to hear evidence of "circumstances attending the execution of the instrument and the situation of the parties at that time," and instead, reasoned that he was able to determine the intent of the parties by considering the entire deed, summary judgment was proper. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Deed is to be construed to ascertain intention of grantor as expressed in language used, construed from four corners of instrument. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Repugnant to Granting Clause. — Introductory recital that defendants claimed created tenancy by entirety was repugnant to granting clause and had to be disregarded. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Was Not Given Effect Over Granting Habendum and Warranty Clauses. — Introductory recital, by virtue of being first in deed, not given effect over granting habendum and warranty clauses which were in accord with each other but inconsistent with introductory recital. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Jury Trial Held Unnecessary. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary. The judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

§ 39-2. Vagueness of description not to invalidate.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Contingent future interests are subject to execution by a judgment creditor of a remainderman. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987), overruling Watson v. Dodd, 68 N.C. 528 (1873), and Bourne v. Farrar, 180 N.C. 135, 104 S.E. 170 (1920), to the extent that they are inconsistent with this holding.

§ 39-6.4. Creation of easements, restrictions, and conditions.

(a) The holder of legal or equitable title of an interest in real property may create, grant, reserve, or declare valid easements, restrictions, or conditions of record burdening or benefiting the same interest in real property.

(b) Subsection (a) of this section shall not affect the application of the doctrine of merger after the severance and subsequent reunification of title to all of the benefited or burdened real property or interests therein. (1997-333, s. 1.)

Editor's Note. — Session Laws 1997-333, s. 2, made this section effective October 1, 1997, and applicable to all easements, restrictions, conditions, or interests created, granted, reserved, or declared before, on, or after the effective date of the act, but not applicable to any litigation pending on the effective date or to any instrument directly or indirectly involved in litigation pending on that date, nor applicable to any litigation in which final judgment has been rendered or to any instrument directly or indirectly involved in any litigation in which final judgment has been rendered on or before that date.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

CASE NOTES

What Deeds Are Cured Under Subsection (a). — The plain language of subsection (a) of this section purports to cure deeds which are void because of failure to conduct a private examination of the wife. Subsection (a) does not purport to cure, and does not in fact cure, deeds which are void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her," as required under former §§ 47-39 and 52-12. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

This section would not validate a deed which failed to comply with former § 52-12; even if this section would operate to validate the deed for failure of the certifying officer to conduct a private examination, the deed would still be invalid because the certifying officer failed to find whether or not the deed was unreasonable or injurious to the wife. Dunn v. Pate, 98 N.C. App. 351, 390 S.E.2d 712, appeal dismissed and cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

§ 39-13.3. Conveyances between husband and wife.

CASE NOTES

Property Not Removed from Equitable Distribution Act by Dissolution of Tenancy by Entirety. — Though conveyances from wife to husband dissolved the tenancy by the entirety in the parcels of land and vested title thereto solely in husband, as § 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired, so the General Assembly has declared, is ipso facto marital property. Thus, contrary to husband's contention, dissolving the tenancy by the entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

CASE NOTES

Cited in Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

§ 39-13.6. Control of real property held in tenancy by the entirety.

Legal Periodicals. —

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For note on the retroactive application of § 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Applicability to tenancies by the entireties which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The General Assembly has clearly manifested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988), rev'd on other grounds, 325 N.C. 428, 383 S.E.2d 656 (1989).

Attribution of Income for Child Support Purposes. — Although under the Child Support Guidelines income from rental property is included in the calculation of a parent's gross income, because father and his wife owned property in tenancy by the entirety, he was considered to have received only one-half of the income, or $487.50 per month; it was therefore error for the trial court to attribute the full amount of rental income from the property to father. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Cited in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

ARTICLE 3.

Fraudulent Conveyances.

§§ 39-15 through 39-23: Repealed by Session Laws 1997-291, s. 1, effective October 1, 1997.

ARTICLE 3A.

Uniform Fraudulent Transfer Act.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

OFFICIAL COMMENT

Prefatory Note

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. it has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the 'better' decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The Conference was persuaded in 1979 to appoint a committee to undertake a study of the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

(1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The Drafting Committee appointed by the Conference held its first meeting in January of 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held four meetings in addition to a meeting held in connection with the Conference meeting in Boca Raton. Meetings were also attended by the following representatives of interested organizations:

Robert Rosenberg, Esq., of the American Bar Association;

Richard Cherin, Esq., of the Commercial Financial Services Committee of the Corporation, Banking and Business Law Section of the American Bar Association;

Robert Zinman, Esq., of the American College of Real Estate Lawyers;

Bruce Bernstein, Esq., of the National Commercial Finance Association;

Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of the American Bar Association.

The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, 'conveyance' having a connotation restricting it to a transfer of personal property. As noted in Comment (2) accompanying § 1(2) and Comment (8) accompanying § 4, however, this Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent - i.e., without regard to the actual intent of the parties - under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged;

(2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in § 4(a)(2)(i) or the mental state specified in § 4(a)(2)(ii).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to him before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the original Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 7 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the original Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. A bracketed paragraph is included in Section 7 for adoption by those states that elect to make such a remedy available.

Section 8 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under § 5(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from Section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

NORTH CAROLINA INTRODUCTORY COMMENT

Prior to enactment of the Uniform Fraudulent Transfer Act (the "UFTA"), the statutory law of fraudulent conveyances in North Carolina was governed principally by former N.C. Gen. Stat. § 39-15, which in turn was a substantial reenactment of the Statute of 13 Elizabeth (1570). *See Bank of New Hanover v. Adrian,* 116 N.C. 537, 21 S.E. 792 (1895). As a reenactment of Elizabethan law, the statute was written in archaic language and was difficult to interpret.

In 1914 the North Carolina Supreme Court clarified fraudulent conveyance law in *Aman v. Walker,* 165 N.C. 224, 815 S.E. 162 (1914), by articulating five distinct rules governing recovery under former N.C. Gen. Stat. § 39-15. Most published decisions after that date used *Aman v. Walker* as their point of reference in deciding fraudulent conveyance issues under North Carolina law. Prior to enactment of the UFTA, however, fraudulent conveyance law in North Carolina was developed by a series of ad hoc appellate decisions that are not altogether uniform or consistent.

The UFTA was drafted by the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") and approved by that organization in 1984. It subsequently was approved by the American Bar Association in 1985. It is the modern successor to the Uniform Fraudulent Conveyance Act, which was promulgated by the NCCUSL in 1918. Among other changes from the old act, the UFTA was broadened to make clear that it reaches transfers of personal as well as real property. The UFTA further is intended to function more congruently with the Uniform Commercial Code (codified as Chapter 25 of the North Carolina General Statutes) and the United States Bankruptcy Code (Title 11, U.S. Code).

While there are a number of differences between the UFTA and the old Uniform Fraudulent Conveyance Act, there are a number of close parallels, and interpretations of the Uniform Fraudulent Conveyance Act can be useful in understanding the intent of the various provisions of the UFTA. A 1972 note by E. Cader Howard that appeared in the North Carolina Law Review comparing the Uniform Fraudulent Conveyance Act with North Carolina law therefore is of special relevance in considering the changes effected by enactment of the UFTA in North Carolina. Note, "The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison With the Uniform Fraudulent Conveyances Act," 50 *N.C. L. Rev.* 872 (1972).

For purposes of the North Carolina comments that follow, the rules articulated by *Aman v. Walker* are identified as the respective "principles"; and the note by E. Cader Howard is cited as "Howard," with appropriate page references to the North Carolina Law Review

Scope of Repeal S.L. 1997-291 repealed former fraudulent conveyance law in Article 3 of Chapter 39 of the General Statutes.

The insurance law contains its own provisions concerning fraudulent transfers by insurance companies within one year prior to insolvency. *See* N.C. Gen. Stat. § 58-30-140. This statute, based on the comparable provision in bankruptcy law (11 U.S.C. § 548), complements general fraudulent conveyance law and concerns itself solely with transfers made within one year prior to the filing of a petition for liquidation or rehabilitation of an insurance company. N.C. Gen. Stat. § 58-30-140 is not affected by the enactment of the UFTA.

Other references to fraudulent conveyances or transfers are found in Rule 18(b) of the Rules of Civil Procedure; in N.C. Gen. Stat. §§ 25-2-402(b) and 25-2A-308(2) (sales and leases under the UCC); and in N.C. Gen. Stat. § 105-242 (dealing with the time within which judgments for taxes are enforceable). None of these statutes is affected by the enactment of the UFTA.

§ 39-23.1. Definitions.

As used in this Article:

(1) "Affiliate" means:

- a. A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
  - 1. As a fiduciary or agent without sole discretionary power to vote the securities; or
  - 2. Solely to secure a debt, if the person has not exercised the power to vote;
- b. A corporation twenty percent (20%) or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
  - 1. As a fiduciary or agent without sole power to vote the securities; or
  - 2. Solely to secure a debt, if the person has not in fact exercised the power to vote;
- c. A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or
- d. A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

- a. Property to the extent it is encumbered by a valid lien;
- b. Property to the extent it is generally exempt under nonbankruptcy law; or
- c. An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

- a. If the debtor is an individual,
  - 1. A relative of the debtor or of a general partner of the debtor;
  - 2. A partnership in which the debtor is a general partner;
  - 3. A general partner in a partnership in which the debtor is a general partner; or
  - 4. A corporation of which the debtor is a director, officer, or person in control;
- b. If the debtor is a corporation,
  - 1. A director of the debtor;

2. An officer of the debtor;
3. A person in control of the debtor;
4. A partnership in which the debtor is a general partner;
5. A general partner in a partnership in which the debtor is a general partner; or
6. A relative of a general partner, director, officer, or person in control of the debtor;

c. If the debtor is a partnership,

1. A general partner in the debtor;
2. A relative of a general partner in, a general partner of, or a person in control of the debtor;
3. Another partnership in which the debtor is a general partner;
4. A general partner in a partnership in which the debtor is a general partner; or
5. A person in control of the debtor;

d. An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

e. A managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined in accordance with G.S. 104A-1, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) The definition of 'affiliate' is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of 'asset' is substantially to the same effect as the definition of 'assets' in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike that in the earlier Act, does not, however require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under § 2 of this Act, although applicable law may

not allow such an asset to be levied on and sold by a creditor. Cf. Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of 'asset' for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258-59 (1974). The levyable interest of such a tenant is included as an asset under this Act.

The definition of 'assets' in the Uniform Fraudulent Conveyance Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that cannot be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest cannot be subjected to liability for a debt unless it is an obligation owed jointly by the debtor with his or her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to 'generally exempt' property in § 1(2)(ii) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see Comment (8) to § 4 infra), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an 'asset' thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of 'claim' is derived from § 101(4) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words 'claim' and 'debt' as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, e.g.§§ 1(1)(i)(B) and 1(8).

(4) The definition of 'creditor' in combination with the definition of 'claim' has substantially the same effect as the definition of 'creditor' under § 1 of the Uniform Fraudulent Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent

claim may be a creditor protected by this Act.

(5) The definition of 'debt' is derived from §101(11) of the Bankruptcy Code.

(6) The definition of 'debtor' is new.

(7) The definition of 'insider' is derived from § 101(28) of the Bankruptcy Code. The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of 'insider' in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of 'insider' in this Act also differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. § 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. § 102(3)), the word 'includes' is not limiting, however. Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term 'insider.' Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of 'lien' is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define 'judicial lien,' 'lien,' 'security interest,' and 'statutory lien' respectively.

(9) The definition of 'person' is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code, defining 'organization' and 'person' respectively.

(10) The definition of 'property' is derived from § 1-201(33) of the Uniform Probate Code. Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of 'relative' is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of 'transfer' is derived principally from § 101(48) of the Bankruptcy Code.

(13) The definition of 'conveyance' in § 1 of the Uniform Fraudulent Conveyance Act was similarly comprehensive, and the references in this Act to 'payment of money, release, lease, and the creation of a lien or incumbrance' are derived from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, e.g., Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure). The definition of 'valid lien' is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, e.g., Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

NORTH CAROLINA COMMENT

The definition of "asset" in subdivision (2) excludes property to the extent it is encumbered by a lien, is generally exempt from the claims of creditors or is held as entireties property. The intent of this definition is that only those transfers that adversely affect unsecured creditors can occasion liability. This is consistent with prior North Carolina law, which disregarded transfers of assets that were entireties property, *L & M Gas Co. v. Leggett,* 273 N.C. 547, 553, 161 S.E.2d 23, 27-28 (1968), or were subject to a resulting trust, *Kelly Springfield Tire Co. v. Lester,* 190 N.C. 411, 415, 130 S.E. 45, 47 (1925).

The definition of "claim" in subdivision (3) is broad and includes potential liability on contingent claims. This seems consistent with prior North Carolina law: N.C. Gen. Stat. § 1A-1, Rule 18(b), allows a claim for fraudulent conveyance to be joined with a claim to establish the indebtedness that provides the foundation for the fraudulent conveyance claim. Subdivisions (4), (5) and (6) (providing definitions of "creditor," "debt" and "debtor") are based on the definition of "claim."

The definition of "transfer" in subdivision (12) is broad; this breadth appears to be consistent with prior North Carolina law. *See* Howard, 50 *N.C. L. Rev.* at 876-77 (1972).

The remaining definitions (of "lien," "valid lien," "person" and "property" in subdivisions (8), (13), (9) and (10)) appear to be straightforward. Prior North Carolina fraudulent conveyance law does not appear to have concerned itself with defining or explaining these terms.

Editor's Note. — Session Laws 1997-291, s. 4, made this Article effective October 1, 1997, and applicable to all transfers subject to that act made on or after that date.

§ 39-23.2. Insolvency.

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making transfer voidable under this Article.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) is derived from the definition of 'insolvent' in § 101(29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the Uniform Fraudulent Conveyance Act exempt property is excluded from the computation of the value of the assets. See§ 1(2) supra. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the Comment to § 1(2) supra. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(2) supra and subsection (e) of this section.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be 'without knowledge of the voidability of the transfer' in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(2) Section 2(b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of

the Bankruptcy Code. See also U.C.C. § 1-201(23), which declares a person to be 'insolvent' who 'has ceased to pay his debts in the ordinary course of business.' The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 301(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. 'The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect.' Advisory Committee's Note to Rule 301. See also 1 J.Weinstein & M.Berger, Evidence 301 [01] (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, e.g., Hill v. Cargill, Inc. (In re Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn. 1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); In re All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex. 1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); In re Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. Cf. 11 U.S.C. § 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the Uniform Fraudulent Conveyance Act.

(4) Subsection (d) follows the approach of the definition of 'insolvency' in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also Comments to §§ 1(2) and 2(a) supra.

NORTH CAROLINA COMMENT

The drafters of the Uniform Fraudulent Conveyance Act identified confusion about the concept of insolvency as one of the three basic uncertainties in then-existing fraudulent conveyance law. *See* Prefatory Note to Uniform Fraudulent Conveyance Act; Howard, 50 *N.C. L. Rev.* at 875. N.C. Gen. Stat. § 39-23.2, in conjunction with the definitions of "asset" and "debt" (and the various definitions that are employed in connection with those terms), appears to eliminate this uncertainty. There seems to be little substantive change to North Carolina law, although uncertainty as to the meaning of North Carolina law makes this conclusion debatable.

North Carolina fraudulent conveyance cases have long determined solvency by contrasting a person's assets with his liabilities, and have rejected a test concerning whether the person is able to pay his debts in the ordinary course of business. *Silver Valley Mining Co. v. North Carolina Smelting Co.,* 119 N.C. 417, 418-19, 25 S.E. 954, 954-55 (1896); *Unaka and City National Bank of Johnson City, Tennessee v. Lewis,* 201 N.C. 148, 153, 159 S.E. 312, 314 (1931). *But see Sample v. Jackson,* 223 N.C. 335, 339, 26 S.E.2d 876, 879 (1943) *(dictum)* (stating that the North Carolina test is ability to pay debts). *Also cf.* N.C. Gen. Stat. § 25-1-201(23) (UCC definition of "insolvent" is a person who "has ceased to pay his debts in the ordinary course of business.")

Under former North Carolina fraudulent conveyance law, "insolvency" may not have been an element of a fraudulent conveyance so much as solvency (the retention of property "fully sufficient" for the satisfaction of creditors) was a defense. *See* former N.C. Gen. Stat. § 39-17; Howard, 50 *N.C. L. Rev.* at 882-85. *But see Virginia-Carolina Laundry Supply Corp. v. Scott,* 267 N.C. 145, 150, 148 S.E.2d 1, 4 (1966) (holding it was an attacking creditor's burden to demonstrate that transferor was insolvent). Whether a debtor had retained property "fully sufficient" to satisfy his creditors was a jury issue; the courts generally took a case-by-case approach and allowed juries to consider all relevant factors. *Garland v. Arrowood,* 177 N.C. 371, 373, 99 S.E. 100, 102 (1919). *Cf. Williams v. Hughes,* 136 N.C. 58, 48 S.E. 518 (1904) (property retained held as a matter of law not to be fully sufficient). Rules for determining whether retained property was "fully sufficient" did emerge: exempt property was not to be considered; contingent liabilities were to be valued at the amount of the debtor's probable ultimate liability. *Williams v. Hughes, supra; Shuford v. Cook,* 169 N.C. 52, 55, 85 S.E. 142, 144 (1915).

Subsection (b) creates a presumption that a person not generally paying his debts is insolvent. While there appear to be no North Carolina fraudulent conveyance cases that have recognized such a presumption, subsection (b) is consistent with North Carolina definitions of insolvency in some other contexts. *See* N.C. Gen. Stat. § 25-1-201(23) (UCC definition of insolvency); N.C. Gen. Stat. § 58-30-10(13) (definition of insolvency for purposes of laws dealing with insolvent insurance companies); N.C. Gen. Stat. § 53-1(3) (statute dealing with bank insolvency and including bank's inability to meet deposit liabilities within definition).

The definition of insolvency as it relates to partnerships (subsection (c)) appears to be without precedent in North Carolina fraudulent conveyance law, but follows from the concept of a partnership as an association of partners each of whom is liable for the partnership's debts. *See* N.C. Gen. Stat. § 59-45. Outside the context of fraudulent conveyance law, North Carolina has considered a partnership to be insolvent when the debts of the partnership have exceeded the assets of the partnership itself. *Farmer v. Head,* 175 N.C 273, 275-76, 95 S.E 567, 568 (1918).

No North Carolina cases have been located addressing the exclusion of assets that have been the subject of fraudulent transfers (subsection (d)) and the exclusion of debts to the extent they are secured (subsection (e)).

§ 39-23.3. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of G.S. 39-23.4(a)(2) and G.S. 39-23.5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, nonexclusive [noncollusive] foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) This section defines 'value' as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(a)(2) ('reasonably equivalent value');

4(b)(8) ('value ... reasonably equivalent);

5(a) ('reasonably equivalent value');

5(b) ('present, reasonably equivalent value');

8(a) ('reasonably equivalent value');

8(b)), (d), and (e) ('value');

8(f)(1) ('new value'); and

8(f)(3) ('present value').

(2) Section 3(a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in Section 3 is not exclusive. 'Value' is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act--e.g., love and affection. See, e.g., United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(3) Section 3(a) does not indicate what is 'reasonably equivalent value' for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, e.g., Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See e.g., In re Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be fraudulent when the debt secured was only $2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, e.g., Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consid-

eration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, e.g., Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.E. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value); and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (In re Madrid), 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on another ground, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G.Osborne, G.Nelson, & D.Whitman, Real Estate Finance Law 83-84, 95-97 (1979). The premise of the subsection is that 'a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral . . ..' 2 G.Gilmore, Security Interests in Personal Property, 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Section 5(b) infra. Subsection (b) does not apply to an action under Section 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(6) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under§ 5(b) infra.

NORTH CAROLINA COMMENT

Subsection (a) concerns itself with what constitutes "value." The term, qualified with adjectives (principally "reasonably equivalent value") appears throughout N.C. Gen. Stat. §§ 39-23.4, -23.5 and -23.8. Two actions are stated to constitute the giving of "value": transfers of property and securing or satisfying prior debt.

Prior North Carolina law has dealt with what constitutes "full value" or "good consideration," terms that were employed in former N.C. Gen. Stat. §§ 39-16 and -19. The inquiry has generally focused on the amount of consideration, however, rather than on its character. Two types of consideration that have been analyzed in prior law are prior indebtedness (so-called "antecedent debt") and unfulfilled ("executory") promises. As to antecedent debt, prior North Carolina law laid down the same rule as that set out in subsection (a): antecedent debt qualified as consideration. *See Fowle v. McLean,* 168 N.C. 537, 541, 84 S.E. 852, 854 (1915). *See also* Howard, *50 N.C. L. Rev.* at 880-81.

Executory promises of support constituted consideration under prior North Carolina law, subject to a number of exceptions and limits. Services furnished to relatives were presumed to be gratuitous; the relationship of the parties could go far toward raising a presumption that a transfer involved fraudulent intent. *See* Howard, 50 *N.C. L. Rev.* at 881-82. Subsection (a) excludes from the definition of value unperformed promises to furnish support, subject only to an exception for a promise made in the ordinary course of the provisor's business. This blanket exclusion represents a change from prior North Carolina law. Subsection (a) does not expressly address unperformed promises other than to furnish support. *But see* Official Comment 4.

Subsection (b) rejects the so-called "Durrett" rule. *See Durrett v. Washington National Ins. Co.,* 621 F.2d 201 (5th Cir. 1980) (dealing with the Bankruptcy Act provision analogous to Bankruptcy Code § 548(a)(2)); Official Comment 5. The Durrett rule has been rejected by the United States Supreme Court. *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994). There is no North Carolina law on this subject. However subsection (b) is consistent with the philosophy of North Carolina's unique Part 6 of Article 9 of the UCC (N.C. Gen. Stat. § 25-9-601 *et seq.*), which adopts a conclusive presumption that a sale conducted in a certain manner is commercially reasonable.

Editor's Note. — The bracketed word "noncollusive" was inserted in subsection (b) at the direction of the Revisor of Statutes, as the apparently intended word. See the text of the Uniform Fraudulent Transfer Act, § 3(b).

§ 39-23.4. Transfers fraudulent as to present and future creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor;

(12) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due; and

(13) The debtor transferred the assets in the course of legitimate estate or tax planning. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act. Factors appropriate for consideration in determining actual intent under paragraph (1) are specified in subsection (b).

(2) Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes 'reasonably equivalent value' for 'fair consideration.' The transferee's good faith was an element of 'fair consideration' as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under § 8 infra.

(3) Unlike the Uniform Fraudulent Conveyance Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. Cf. U.C.C. § 9-311.

(4) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent Conveyance Act but substitutes 'unreasonably small [assets] in relation to the business or transaction' for 'unreasonably small capital.' The reference to 'capital' in the Uniform Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of 'capital' in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, i.e., unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes fraud conclusively--i.e., without regard to the actual intent of the parties--when they concur as provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when un-

accompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences§ 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it ‘was made honestly, truly, and bona fide,‘ but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of ‘good faith‘ can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in § 4(b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (In re Kaiser), 722 F.2d 1574, 1582-83 (2d Cir. 1983) (insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent). =cmty — (e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: In re Thomas, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y 1914), aff'd, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59

Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all nonexempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W. 2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W. 2d 288, 292 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtor's property was transferred).

(7) The effect of the two transfers described in§ 4(b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (id. at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va. L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir. 1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa. 1964); and see In re Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md. 1933).

(8) Nothing in § 4(b) is intended to affect the application of § 2-402(2), 9-205, 9-301, or 6-105 of the Uniform Commercial Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from 'retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification.' Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of § 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally,

like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

NORTH CAROLINA COMMENTARY

This section and N.C. Gen. Stat. § 39-23.5 are the primary provisions of the UFTA, as they define which transfers are voidable.

This section differs from the version promulgated by the NCCUSL in three respects. The General Assembly deleted the phrase "or reasonably should have believed" in subsubdivision (a)(2)b. and added subdivision (b)(12). Because the drafters believed that this change converted constructive intent from an element of a conveyance deemed fraudulent to a factor to be considered in determining intent, the phrase "actual intent" was changed to "intent" in subsubdivision (a)(2)b. and the introductory language of subsection (b). The General Assembly also added subdivision (b)(13).

The reference to "obligation incurred" in subsection (a) represents a change from prior North Carolina law, and reflects a recognition that a debtor can harm creditors by incurring a fraudulent debt as well as by making a fraudulent transfer.

Except for the change described in the preceding sentence, subdivision (a)(1) does not change fraudulent transfer law in North Carolina. Under prior law, once a creditor had shown actual fraud on the part of the debtor, the transfer was void whether the creditor's claim was in existence at the time of the transaction or arose subsequently. *See generally* Howard, 50 *N.C. L. Rev.* at 887. Subdivision (a)(1) is subject to an important limitation: under N.C. Gen. Stat. § 39-23.8(a), a transfer or obligation is not voidable under subdivision (a)(1) against a person who took in good faith and for a reasonably equivalent value. With that limitation, subdivision (a)(1) is consistent with prior North Carolina law. *See* former N.C. Gen. Stat. § 39-19; *Aman v. Walker,* 165 N.C. 224, 227, 81 S.E. 162, 164 (1914) (principle four).

Subdivision (a)(2) is intended to address transactions for less than "reasonably equivalent value" that leave a debtor undercapitalized (*see* Official Comment 4) and applies both to present and subsequent creditors. It should be contrasted with N.C. Gen. Stat. § 39-23.5(a), which addresses transactions for less than "reasonably equivalent value" made when a debtor is or becomes "insolvent" but which applies only to creditors whose claims arose before the transaction.

Prior North Carolina law invalidated transactions for less than a "reasonably fair price" when the debtor failed "to retain property fully sufficient and available to pay his debts then existing." *Aman v. Walker,* 165 N.C. 224, 227, 18 S.E. 162, 164 (1914) (principle two). The rule clearly applied to transactions occurring when a debtor was "insolvent" in a "balance sheet" sense. *See* North Carolina Comment to N.C. Gen. Stat. § 39-23.2. Under prior law a subsequent creditor could use the fact that a conveyance left a business with "unreasonably small capital" as evidence of fraud, but the creditor nevertheless would have to prove fraudulent intent in order to void the conveyance. Howard, *50 N.C. L. Rev.* at 888.

Subdivision (a)(2) refers to transactions causing a debtor to incur debts beyond the debtor's ability to pay as they become due. As noted, under prior law when a debtor engaged in a transaction for less than a "reasonably fair price" and failed "to retain property fully sufficient and available to pay his creditors then existing," the transaction generally was voidable only by a creditor whose claim was in existence as of the time of the transaction in question. *See* North Carolina Comment to N.C. Gen. Stat. § 39-23.5. Subdivision (a)(2) broadens prior law since it can be invoked "whether the creditor's claim arose before or after" the transaction.

Subsection (b) is a non-exclusive list of "badges of fraud" that can be considered in establishing a debtor's fraudulent intent within the meaning of subdivision (a)(1). North Carolina law has long recognized "badges of fraud" in fraudulent conveyance litigation, *see, e.g., Peebles v. Horton,* 64 N.C. 374, 377 (1870), and decisions have identified several of the factors enumerated in subsection (b). Among these factors are close family relationship (*Wurlitzer Dist. Corp. v. Schofield,* 44 N.C. App. 520, 529, 261 S.E.2d 688, 694 (1980), *Nytco Leasing, Inc. v. Southeastern Motels, Inc.,* 40 N.C. App. 120, 130, 252 S.E.2d 826, 833 (1979), *Unaka & City Nat'l Bank v. Lewis,* 201 N.C. 148, 156, 159 S.E. 312, 316-17 (1931), *Peeler v. Peeler,* 109 N.C. 628, 634, 14 S.E. 59, 62 (1891)); retention of possession (*Piedmont Sav. Bank v. Levy,* 138 N.C. 274, 50 S.E. 657 (1905)); secrecy (*Reiger v. Davis,* 67 N.C. 185, 189 (1872)); and pending litigation (*Helms v. Green,* 105 N.C. 251, 262, 11 S.E. 470, 474 (1890)). As noted above, subdivision (b)(12) incorporates language deleted from UFTA § 4(a), where it would have had a more automatic effect, rather than being a "factor" that "may" be considered, and subdivision (b)(13) is wholly new.

Under prior law certain combinations of "badges of fraud" could give rise to a rebuttable presumption of fraudulent intent. Howard, 50 *N.C. L. Rev.* at 891-893. According to Official Comment 5, however, proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's intent but does not create a presumption that the debtor has engaged in a fraudulent transaction.

§ 39-23.5. Transfers fraudulent as to present creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) is derived from § 4 of the Uniform Fraudulent Conveyance Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in Comment (2) accompanying § 4, this Act substitutes 'reasonably equivalent value' for 'fair consideration.'

(2) Subsection (b) renders a preferential transfer--i.e., a transfer by an insolvent debtor for or on account of an antecedent debt--to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); In re Lamie Chemical Co., 296 F. 24 (4th Cir. 1924) (corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir. 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (rev. ed. 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 389 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as n/§ 8(a) of the Uniform Fraudulent Conveyance Act and§ 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an

insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under n/§ 4(b) unless the transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

NORTH CAROLINA COMMENT

As in N.C. Gen. Stat. § 39-23.4(a), subsection (a) here adds "obligation incurred" as potential subjects of fraudulent transfer law. In other respects subsection (a) corresponds to principle two of *Aman v. Walker,* 165 N.C. 224, 227, 81 S.E. 162, 164 (1914), which invalidated conveyances for less than a "reasonably fair price" where the debtor "did not retain property fully sufficient and available to pay his debts then existing." Subsection (a) is narrower than prior law in one respect, however. Prior law gave standing to challenge a transaction only to creditors with claims in existence at the time of the transaction that remained unpaid, *see Powell Bros. v. McMullan Lumber Co.,* 153 N.C. 52, 58, 68 S.E. 926, 928-29 (1910), but once the transaction was voided, subsequent creditors could participate in the redistribution of assets recovered. Subsection (a), however, states only that the defined category of transactions "is fraudulent as to a creditor whose claim arose before" the transaction.

The effect of subsection (b) is to create a cause of action for "insider preferences" roughly comparable to similar claims under § 547 of the United States Bankruptcy Code (11 U.S.C. § 547). Unlike 11 U.S.C. § 547, however, subsection (b) contains the requirement that the insider must have had "reasonable cause to believe" the debtor was insolvent. N.C. Gen. Stat. § 39-23.8(f) contains several defenses addressed specifically to subsection (b).

Subsection (b) has no counterpart under prior North Carolina law.

§ 39-23.6. When transfer is made or obligation is incurred.

For the purposes of this Article:

(1) A transfer is made:
  a. With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and
  b. With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this Article that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this Article, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subdivision (1) of this section, the transfer is

made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

a. If oral, when it becomes effective between the parties; or

b. If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee. (1997-291, s. 2.)

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (b) clarifies this point in time. For transfers of real estate Section 6(1) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personalty, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See U.C.C. §§ 9-302, 9-304, and 9-305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property § 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers--e.g., an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement--may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (11), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in § 1(12) supra.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. Cf. Bankruptcy Code § 547(e); U.C.C. § 9-203(1)(c).)

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, supra at 243-46.

NORTH CAROLINA COMMENTARY

Subdivision (1) provides a general rule that is consistent with the rule found in bankruptcy law, *see* 11 U.S.C. §§ 548(d), 547(e)(1), and with the insolvency law North Carolina applies to insurance companies, *see* N.C. Gen. Stat. § 58-30-140(b).

Subdivision (4), providing that a transfer does not become effective until the debtor has rights in the collateral, mirrors the comparable provision in Article 9 of the UCC, N.C. Gen. Stat. § 25-9-203(1)(c).

§ 39-23.7. Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this Article, a creditor, subject to the limitations in G.S. 39-23.8, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Article 35 of Chapter 1 of the General Statutes;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

  a. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

  b. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

  c. Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, e.g., Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir. 1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S. 2d 115 (1st Dep't 1976). Section 7(a)(2) continues the authorization for the use of attachment contained in§ 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, e.g., Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v.

Schusheim, 36 Misc. 2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See n/§ 1(3) and (4) supra; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform Fraudulent Conveyance Act. See, e.g., Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) (‘In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error‘); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 441-42 (1933).

(6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform Fraudulent Conveyance Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the ‘old practice‘ of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an ‘additional optional remedy‘ and not to ‘deprive a creditor of the right, as formerly, to work out his remedy at law‘); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev.ed. 1940).

NORTH CAROLINA COMMENT

The remedies provided in N.C. Gen. Stat. § 39-23.7 are cumulative and are not exclusive. Subdivision (a)(1)'s remedy of avoiding the fraudulent transfer is consistent with prior North Carolina fraudulent conveyance law, which was derived from the Statute of 13 Elizabeth.

Attachment and other pre-judgment remedies or relief under subdivisions (a)(2) and (a)(3) are subject to applicable due process protections. They also are subject to the substantive and procedural requirements separately provided for those remedies under applicable law. *See, e.g.,* N.C. Gen. Stat. §§ 1-440.1, *et seq.*; 1A-1, Rule 65; 1-485, *et seq.*; and 1-501, *et seq.*

Any request for pre-judgment or post-judgment relief against a transferee under subsections (a)(3) or (b), or against an asset in the hands of a transferee, necessarily requires due process as to the transferee. For example, such a transferee has a right to notice and an opportunity to appear and assert the defenses and protections available under § 39-23.8. This is consistent with prior North Carolina law, which also required that the transferee be given notice of a fraudulent conveyance action. *See, e.g., Dawson Bank v. Harris,* 84 N.C. 206, 212 (1881).

§ 39-23.8. Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under G.S. 39-

23.7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this Article, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under G.S. 39-23.4(a)(2) or G.S. 39-23.5 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9 of Chapter 25 of the General Statutes, the Uniform Commercial Code.

(f) A transfer is not voidable under G.S. 39-23.5(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor, and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Section 4(a)(1). The subsection is an adaptation of the exception stated in n/§ 9 of the Uniform Fraudulent Conveyance Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F. Supp. 276, 280 (D.N.J. 1948), aff'd, 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest on the transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) supra.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, e.g., United States v. Fernon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); cf. Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The

premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code§ 550(d); Janson v. Schier, 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaptation of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

Subsection (e)(1) rejects the rule adopted in Darby v. Atkinson (In re Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code. Cf. Calaiaro v. Pittsburgh Nat'l Bank (In re Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in § 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under § 9-502 or § 9-505 of the Code, the creditor must proceed in good faith (U.C.C.§ 9-103) and in a 'commercially reasonable' manner. The 'commercially reasonable' constraint is explicit in U.C.C. § 9-502(2) and is implicit in § 9-505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under § 5(b).

Paragraph (1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See, e.g., In re Ira Haupt & Co., 424 F.2d 722, 724 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. (In re Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); In re John Morrow & Co., 134 F.686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (2) is derived from § 546(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the 'ordinary course' requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under § 5(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508-09 (8th Cir. 1935); Olive v. Tyler (In re Chelan Land Co.), 257 F.497, 5 A.L.R. 561 (9th Cir. 1919); In re Robin Bros. Bakeries, Inc., 22 F.S. 662, 663-64 (N.D.Ill. 1937); see Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

NORTH CAROLINA COMMENT

Subsection (a) is consistent with former fraudulent conveyance law in North Carolina. *See, e.g.,* former N. C. Gen. Stat. § 39-19; *Aman v. Walker,* 165 N.C. 224, 81 S.E.2d 162 (1914) (principle four). A transferee has the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Subsection (b) restricts a complaining creditor to relief equal to the lesser of the amount of his claim or the value of the property transferred, and in this respect is comparable to section 550(a) of the Bankruptcy Code, 11 U.S.C. § 550(a). Unlike former N.C. Gen. Stat. § 39-15, which provided only for avoidance of a conveyance in its entirety, subsection (b) establishes limits on a transferee's liability.

Subsection (c) is significant if the value of an asset has changed while in the hands of a transferee. As a matter of equity, when a transferee has enhanced the asset's value through improvements, the transferee should be entitled to retain the value of that increase despite avoidance of the transfer. Similarly, when a transferee has decreased the value (for example, by mining, harvesting timber or removing pre-existing improvements or fixtures), the transferee should be liable for the reduction. Subsection (c) allows a court, through application of equitable principles, to allocate post-transfer changes in value among the competing parties, which was not an issue specifically addressed under prior North Carolina statute or case law.

Subsection (d) provides that, when a transfer is avoided, a good faith transferee who gave less than reasonably equivalent value does not forfeit the value of the consideration given. It is an adaptation of section 548(c) of the Bankruptcy Code, 11 U.S.C. § 548(c), and preserves for a transferee specific rights in the property to the extent of actual value given. North Carolina's former fraudulent conveyance statutes did not provide similar protections for a good faith transferee, nor had the North Carolina courts addressed this issue.

Subsection (f) allows insiders certain additional defenses for transfers otherwise avoidable under N.C. Gen. Stat. § 39-23.5(b), which effectively balances that section's refusal to allow an insider's antecedent debt to qualify as reasonably equivalent value. Subsection (f) is derived from section 547(c) of the Bankruptcy Code, 11 U.S.C. § 547(c). The foundation of each of these defenses to "preferential" payment of insider debts — new value, ordinary course of business or financial affairs, and contemporaneous provision of value given in good faith to rehabilitate — is that encouraging normalized dealings with a financially distressed debtor may help that debtor avoid insolvency, receivership or bankruptcy, which is in the best interests of all creditors.

§ 39-23.9. Extinguishment of cause of action.

A cause of action with respect to a fraudulent or voidable transfer or obligation under this Article is extinguished unless action is brought:

(1) Under G.S. 39-23.4(a)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), within four years after the transfer was made or the obligation was incurred; or

(3) Under G.S. 39-23.5(b), within one year after the transfer was made or the obligation was incurred. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) and (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).)

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to § 7(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See § 10 and the accompanying Comment infra. =cmty — The UFTA provides for three limitations periods. As to transfers made with actual intent to defraud, there is a four year statute that accrues upon the date of transfer, but with a proviso that an aggrieved party shall have a minimum limitations period of one year from the date the transfer was or reasonably could have been discovered. As to claims based on a transfer in which the debtor does not receive reasonably equivalent value, the limitations period is four years from the date of transfer. The limitations period for a transfer to an insider in payment of an antecedent debt is one year.

The introductory language of this section, which speaks in terms of a cause of action being "extinguished," is intended to indicate that lapse of the statutory period bars the right as well as the remedy. Thus, the discovery rule of N.C. Gen. Stat. § 1-52(9) would not apply to claims within subsections (b) or (c), even if such claims were made under circumstances such that N.C. Gen. Stat. § 1-52(9) would otherwise apply.

The defense of laches is available in appropriate cases. *See* N.C. Gen. Stat. § 39-23.10.

§ 39-23.10. Supplementary provisions.

Unless displaced by the provisions of this Article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions. (1997-291, s. 2.)

OFFICIAL COMMENT

This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and § 1-103 of the Uniform Commercial Code. The section adds a reference to 'laches' in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

NORTH CAROLINA COMMENT

This section is derived in part from section 1-103 of the Uniform Commercial Code. *See* N.C. Gen. Stat. § 25-1-103.

According to the Official Comment to this section, the defense of laches (which does not appear in UCC § 1-103) has been specifically added to the UFTA "in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer."

§ 39-23.11. Uniformity of application and construction.

This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1997-291, s. 2.)

NORTH CAROLINA COMMENT

A uniformity provision such as this appears in over two dozen uniform acts adopted in North Carolina. *See, e.g.*, N.C. Gen. Stat. § 25-1-102(2)(c) (Uniform Commercial Code). The North Carolina courts have occasionally cited such a provision in connection with their construction of a uniform act. *North Carolina Reinsurance Facility v. North Carolina Ins. Guaranty Ass'n.*, 67 N.C. App. 359, 372, 313 S.E.2d 253, 262 (1984) (applying N.C. Gen. Stat. § 58-155.17).

§ 39-23.12. Short title.

This Article may be cited as the Uniform Fraudulent Transfer Act. (1997-291, s. 2.)

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.

CASE NOTES

Controlling Effect of § 1-69.1. — This section was enacted in 1939. The amendment to § 1-69.1, which added the requirement of an allegation of § 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, § 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of § 1-69.1 are mandatory and failure to satisfy them is not exonerated by this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

§ 39-25. Title vested; conveyance; probate.

CASE NOTES

Unincorporated, Unregistered Association May Hold Property in Its Common Name. — Under the wording of this section, unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with § 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirement That Unincorporated Association Allege Registration. — While it is true that § 1-69.1 requires unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

ARTICLE 5A.

Control Corners in Real Estate Developments.

§ 39-32.3. Recordation of plat showing control corners.

Upon designating a control corner and affixing a permanent marker, said person, firm or corporation shall cause to be filed in the office of the register of deeds of the county in which the real estate development is located a map or plat showing the location of the control corner or corners and permanent marker or markers with adequate and sufficient description to enable a surveyor to locate such control corner or marker. No map or plat of a real estate subdivision or development made after July 1, 1947, shall be certified for recording pursuant to G.S 47-30.2 unless the location of control corners is shown thereon. (1947, c. 816, s. 3; 1997-309, s. 1.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted the present last sentence for "The register of deeds shall not accept for registration or record any map or plat of a real estate subdivision or development made after July 1, 1947, unless the location of such control corner or corners is shown thereon."

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-37. Short title.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 39-38. Uniformity of interpretation.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-39. Risk of loss.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Risk of Loss Not Shifted to High Bidder Prior to Closing. — Under this Act the making of the high bid in a foreclosure sale does not operate to extinguish the seller's interests and shift all risks to the purchaser. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the mortgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Article 8.

Business Trusts.

§§ 39-48, 39-49: Reserved for future codification purposes.

Article 9.

Disclosure.

§ 39-50. Death or illness of previous occupant.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property; provided, however, that no seller may knowingly make a false statement regarding such past occupancy. (1989, c. 592, s. 1.)

Editor's Note. — Session Laws 1989, c. 592, s. 3 made this Article effective July 1, 1989, and applicable to acts or omissions occurring on or after July 1, 1989.

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.
40A-3. By whom right may be exercised.
40A-4. No prior purchase offer necessary.
40A-6. Reimbursement of owner for taxes paid on condemned property.

Article 3.

Condemnation by Public Condemnors.

40A-42. Vesting of title and right of possession; injunction not precluded.

Article 5.

Return of Condemned Property.

40A-70. Return of condemned property.

Article 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Conover: 1985, c. 422; city of Hickory: 1985, c. 422; city of Rocky Mount: 1989, c. 328, s. 1; city of Wilson: 1989, c. 348, s. 1; city of Winston-Salem: 1985, c. 47; 1987, c. 95; town of Apex: 1987, c. 70; town of Maiden: 1985, c. 422. For additional local modifications to this section, see the main pamphlet.

Legal Periodicals. —

For article, "Out of Focus: The Fuzzy Line Between Regulatory 'Takings' and Valid Zoning-Related 'Exactions' in North Carolina and Federal Jurisprudence," see 16 Campbell L. Rev. 333 (1994).

CASE NOTES

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in § 40A-3, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Municipal Annexation Proceedings Enjoined by Condemnor-County. — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Applied in Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17 (1985).

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995).

§ 40A-2. Definitions.

CASE NOTES

Definition of "property" is broad enough to include profits à prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condemnation. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

The term "other persons" as used in the cartway statute, does include counties. Davis v. Forsyth County, 117 N.C. App. 725, 453 S.E.2d 231 (1995).

Cited in VEPCO v. Tillett, 316 N.C. App. 73, 343 S.E.2d 188 (1986).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

a. Not be less than 50 feet nor more than 100 feet in width; and

b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining,

operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities.

The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part; provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162A-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1.)

Local Modification. — Guilford: 1987, c. 669, s. 3; Iredell: 1985, c. 570, s. 25; Stanly: 1985, c. 433, s. 2; 1989 (Reg. Sess., 1990), c. 839; Wake: 1985, c. 640, s. 1; 1993, c. 137, s. 2; Winston-Salem/Forsyth County Utility Commission: 1989 (Reg. Sess., 1990), c. 849; city of Asheville: 1985, c. 556, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 3; city of Morganton: 1987, c. 265, s. 1; city of Monroe: 1985, c. 177; city of Raleigh: 1985, c. 556, s. 2; city of Statesville: 1985, c. 570, s. 25; 1987, c. 265, s. 1; town of Carrboro: 1987, c. 476, s. 1; town of Cary: 1993, c. 137, s. 2; town of Wrightsville Beach: 1993, c. 187, s. 1; Grandfather Village: 1987, c. 419, s. 1; village of Pinehurst: 1985, c. 379, s. 2.

Cross References. — As to requirement for consent of board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

CASE NOTES

I. General Consideration.
II. Public Use.
III. Private Condemnors.
  A. In General.
IV. Public Condemnors.
VI. Judicial Review.

I. GENERAL CONSIDERATION.

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Subdivision ordinance as applied by defendant constituted an exaction requiring the court to determine whether the exaction amounted to an unconstitutional taking; therefore, summary judgment for defendant was inappropriate as to that issue. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Applied in City of Burlington v. Isley Place Condominium Ass'n, 105 N.C. App. 713, 414 S.E.2d 385 (1992).

Cited in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Pinehurst v. Regional Invs., 97 N.C. App. 114, 387 S.E.2d 222 (1990); Board of Educ. v. Seagle, 120 N.C. App. 566, 463 S.E.2d 277 (1995), cert. denied, 343 N.C. 509, 471 S.E.2d 63 (1996); Stout v. City of Durham, 121 N.C. App. 716, 468 S.E.2d 254 (1996).

II. PUBLIC USE.

Meaning of "Public Use". —

The statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. Rather, because of the progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with the changing times. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Test of Public Use or Benefit. — On judicial determination of whether a condemnor's intended use is an action for "the public use or benefit" under this section, courts in this and other states have employed essentially two approaches to this problem. The first approach — the public use test — asks whether the public has a right to a definite use of the condemned property. The second approach — the public benefit test — asks whether some benefit accrues to the public as a result of the desired condemnation. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Question of Law. — While the delegation of the power of eminent domain is for the legislature, the determination of whether a condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

A taking can be for public use or benefit even when there is also a substantial private use, so long as the private use in question is incidental to the paramount public use. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

The provision of telephone service, irrespective of the number of customers affected, is an action for "the public use or benefit." Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one individual's manufacturing plant involved a private use, despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

IV. PUBLIC CONDEMNORS.

Public Recreational Facility Need Not Be Designed Before Land Is Acquired. — Neither subdivision (b)(3) of this section, which vests municipalities with the power of eminent domain to establish, enlarge or improve parks, playgrounds and other recreational facilities, nor § 160A-353, of similar import, nor any other statute contains any requirement that the city design a public facility authorized by resolution before the land for the facility is acquired. City of Charlotte v. Rousso, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Local Zoning Laws. — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in subdivision (b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws, by virtue of the fact that through §§ 153A-347 and 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

Municipal Airports. — The provisions of this Chapter now control cities' eminent domain actions with respect to airports. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

It was not error to find that plaintiff was authorized to acquire land for parks, recreational programs and facilities through exercise of power of eminent domain. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

VI. JUDICIAL REVIEW.

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989), citing Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989), rev'd on other grounds, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

§ 40A-4. No prior purchase offer necessary.

The power to acquire property by condemnation shall not depend on any prior effort to acquire the same property by gift or purchase, nor shall the power to negotiate for the gift or purchase of property be impaired by initiation of condemnation proceedings. A potential condemnor who seeks to acquire property by gift or purchase shall give the owner written notice of the provisions of G.S. 40A-6. (1981, c. 919, s. 1; 1997-270, s. 4.)

Effect of Amendments. — The 1997 amendment, effective July 3, 1997, and applicable to transfers made on or after August 1, 1997, added the second sentence.

§ 40A-5. Condemnation of property owned by other condemnors.

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 1; 1993 (Reg. Sess., 1994), c. 700, s. 1.

§ 40A-6. Reimbursement of owner for taxes paid on condemned property.

(a) An owner whose property is totally taken in fee simple by a condemnor exercising the power of eminent domain, under this Chapter or any other statute, shall be entitled to reimbursement from the condemnor of the pro rata portion of real property taxes paid by the owner that are allocable to a period subsequent to vesting of title in the condemnor, or the effective date of possession of the real property, whichever is earlier.

(b) An owner who meets the following conditions is entitled to reimbursement from the condemnor for all deferred taxes paid by the owner pursuant to G.S. 105-277.4(c) as a result of the condemnation:

(1) The owner is a natural person whose property is taken in fee simple by a condemnor exercising the power of eminent domain under this Chapter or any other statute.

(2) The owner also owns agricultural land, horticultural land, or forestland that is contiguous to the condemned property and that is in active production.

The definitions in G.S. 105-277.2 apply in this subsection. (1975, c. 439, s. 1; 1981, c. 919, s. 1; 1997-270, s. 1.)

Effect of Amendments. — The 1997 amendment, effective July 3, 1997, and applicable to transfers made on or after August 1, 1997, designated the existing provisions as subsection (a), added subsection (b), and made stylistic and punctuation changes.

§ 40A-8. Costs.

CASE NOTES

Award of Attorneys' Fees in Inverse Condemnation Proceeding. — It is consistent with this section to award attorneys' fees when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking. City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989), cert. denied, 326 N.C. 363, 389 S.E.2d 816 (1990).

Plaintiff Could Not Proceed in One Action with Petition for Certiorari and Complaint for Costs, Damages, etc. — Plaintiff's petition for writ of certiorari to review town's decision denying plaintiff's subdivision permit application was improperly joined with her complaint against the town in which she alleged constitutional violations and sought damages, costs, and attorneys' fees pursuant to this section. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under this section was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Cited in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989).

§ 40A-10. Sale or other disposition of land condemned.

Local Modification. — Cabarrus: 1991, c. 685, s. 8; Cabarrus County and any incorporated municipality partly or wholly in Cabarrus County: 1985, c. 269.

§ 40A-12. Additional rules.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Article 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

§ 40A-22. Service.

CASE NOTES

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

CASE NOTES

II. Exceptions and Appeals.

II. EXCEPTIONS AND APPEALS.

Filing Exceptions to Commissioner's Report as Prerequisite to Filing of Appeal. — The respondents failed to make any exceptions to the Commissioner's report. They also failed to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed. Carolina Power & Light Co. v. Crowder, 89 N.C. App. 578, 366 S.E.2d 499 (1988).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

Local Modification. — City of Durham: 1993, c. 476, s. 1.

Cross References. — As to requirement for consent of the board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

CASE NOTES

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

§ 40A-41. Institution of action and deposit.

Local Modification. — Cabarrus: 1985, c. 194, s. 2. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Stated in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

Cited in Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995); City of Greensboro v. Pearce, 121 N.C. App. 582, 468 S.E.2d 416 (1996).

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

(a) When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10) or (12), title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or

(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor. (1981, c. 919, s. 1; 1989 (Reg. Sess., 1990), c. 871, s. 1.)

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 2; 1993 (Reg. Sess., 1994), c. 700, s. 1; Duplin: 1993 (Reg. Sess., 1994), c. 608, s. 1; Franklin: 1989, c. 432, s. 1; Guilford: 1987, c. 669, s. 4; Person: 1983, c. 829; Wake: 1985, c. 640, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 4; town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; town of Wrightsville Beach: 1993, c. 187, s. 2. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Subsection (a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under § 40A-45 landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Title of Defendants Holding Property as Tenants by Entirety Need Not Be Divested Simultaneously in Condemnation Proceeding. — Where plaintiff acquired title to defendants' interest in certain property owned by them as tenants by the entirety, and even though plaintiff argued such title on separate dates, this Chapter contains no requirement that title to condemned property be divested simultaneously. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Effect of Answer Which Did Not Contest Plaintiff's Power to Condemn. — Where, in condemnation proceeding original answer of defendant property owner contested only amount of compensation due and did not contest power of plaintiff to condemn property, title to defendant's interest vested in plaintiff at that time, and plaintiff's filing of amended complaint did not void defendant's original answer. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Cited in UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 432 S.E.2d 699 (1993).

§ 40A-45. Answer, reply and plat.

CASE NOTES

Section 40A-42(a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under this section landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Property Owners Not Entitled to Injunctive Relief. — As subdivision (a)(3) of this section gave owners an opportunity to raise in court the issue of pending voluntary annexation proceeding, they had an adequate remedy at law and were not entitled to injunctive relief granted by the trial court, enjoining county from proceeding with condemnation proceeding. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

§ 40A-46. Time for filing answer; failure to answer.

CASE NOTES

Applied in Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

§ 40A-47. Determination of issues other than damages.

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-48. Appointment of commissioners.

CASE NOTES

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

What Constitutes a "Project" Under this Section. — Although defendant designated the entire widening of the road as a "project," where there was evidence that individual sections were also referred to as "projects," because the road was widened in sections by different contractors, and there were beginning and ending points to the widening of each section, these individual sections met the definition of "projects" for purposes of subsection (a). McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Where plaintiffs sued for inverse condemnation by city whose road widening project was composed of many separate projects performed by more than one contractor, the plaintiffs had 24 months from the completion of the individual section of road encroaching upon their property which for purposes of subsection (a) was the "project" involving the taking. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Applicability of Subsection (c). — Although subsection (c) provides that "nothing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," it was not relevant in an inverse condemnation case, since an owner has no common-law right to bring a trespass action against a city. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common-law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse condemnation action involving a taking occurring as a result of the construction and operation of an airport runway. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The individual section of widened roadway, which constituted the taking by inverse condemnation of plaintiff's property, was not completed until the maintenance period was completed; the statutory period runs from the completion of the "project," which does not necessarily mean it runs from the completion of construction. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Cause of Action Time Barred. — Billboard owner's cause of action based on an alleged regulatory taking accomplished by enactment of zoning ordinance arose on April 15, 1985, the date the zoning ordinance at issue was enacted and not April 15, 1992, the end of the amortization period when the signs were required to be removed; plaintiff who did not file suit until May 11, 1992, over seven years after the enactment of the zoning ordinance at issue, was barred. Naegele Outdoor Adv., Inc. v. City of Winston-Salem, 340 N.C. 349, 457 S.E.2d 874 (1995).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Migration of Cases from City Landfill. — Because this section, the inverse condemnation provision, provides a landowner's only remedy for alleged damage in the nature of a "taking," the court granted summary judgment as to multi-family apartment complex developer's state, common-law claims for nuisance, trespass, and negligence based on migration of methane gases from city landfill. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Strict Liability Action Was Not Precluded. — Developer's strict liability claim based on migration of methane gases from city landfill based on the

North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 was not preempted by this section. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under § 40A-8 was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Applied in City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989); Naegele Outdoor Adv., Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177, cert. denied, 336 N.C. 604, 447 S.E.2d 390 (1994).

§ 40A-55. Payment of compensation.

CASE NOTES

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in In re Lee, 85 N.C. App. 302, 354 S.E.2d 759 (1987).

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

CASE NOTES

Real Property Valuations for Ad Valorem Purposes Admissible. — Evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county, in an eminent domain proceeding, as an admission of a party opponent. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-63. In general.

CASE NOTES

Valuation of Land as of Date of Taking. —

In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Price of Reconveyed Property. — Section 136-19, when read consistently with this section and § 40A-65, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Stated in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 40A-64. Compensation for taking.

CASE NOTES

Landowner's Son Competent to Give Opinion of Land Value. — The son of a landowner who had exhibited a great deal of familiarity with the property, as well as neighboring properties, and was familiar with the value of these properties was competent to give an opinion as to the land value. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986).

Evidence Sufficient for Jury Question. — Where defendant landowner's evidence consisted of the before and after values of the tract that sewer line easement affected, there was sufficient evidence to go to the jury. Guilford County v. Kane, 114 N.C. App. 243, 441 S.E.2d 556 (1994).

Measure of compensation to one who loses right to remove sand and gravel from the property of another, when that right has never been exercised and the sand and gravel remain in the ground untouched, is the fair market value of the sand and gravel in place. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Where petitioner which had the contractual right to remove sand and gravel from property which was condemned, failed to show by credible and convincing evidence the value of its interest in the condemned land, petitioner was entitled to nominal damages only. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Effect of Condemnation on Lost Rental Value. — Testimony by owner of rental property that the value of property remaining after taking would be diminished was permissible, and instruction that testimony was competent only on the question of impact on fair market value, and not lowered or lost rents, was adequate. City of Fayetteville v. M.M. Fowler, Inc., 122 N.C. App. 478, 470 S.E.2d 343 (1996).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-65. Effect of condemnation procedure on value.

CASE NOTES

Price of Reconveyed Property. — Section 136-19, when read consistently with § 40A-63 and this section, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Evidence of Highest and Best Use as If Not Under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnee's expert witness as to the property's highest and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

§ 40A-67. Entire tract.

CASE NOTES

Inchoate Dower Interest Sufficient. — A person's inchoate dower interest in his spouse's real property is interest sufficient to constitute an interest and estate in land for purposes of unity of ownership under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994), cert. denied, 340 N.C. 110, — S.E.2d —, 340 N.C. 260, 456 S.E.2d 519 (1995).

Land Used as Integrated Economic Unit. — Defendants' tracts of land, which defendants were holding for future development, were "being used as an integrated economic unit," as required under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994), cert. denied, 340 N.C. 110, — S.E.2d —, 340 N.C. 260, 456 S.E.2d 519 (1995).

ARTICLE 5.

Return of Condemned Property.

§ 40A-70. Return of condemned property.

Whenever a public condemnor listed in G.S. 40A-3(b) or (c) acquires real property by condemnation and thereafter determines that the property is not needed for the purpose for which it was condemned, and the public condemnor still owns the property, the public condemnor may reconvey the property to the original owner upon payment to the public condemnor of the full price paid to the owner when the property was taken by eminent domain, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property. Unless the public condemnor acquired the entire lot, block, or tract of land belonging to the original owner, the original owner must own the remainder of the original lot, block, or tract of land from which the property was acquired to purchase the property pursuant to this section. The public condemnor shall specify a date by which the property must be reconveyed and the payment made, which may not be less than 30 days after written notification to the original owner that the public condemnor has decided to offer the return of the property. (1991 (Reg. Sess., 1992), c. 980, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 980, s. 2 made this article effective upon ratification. The act was ratified July 20, 1992.

Chapter 41.

Estates.

Sec.
41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Article 2.

Uniform Statutory Rule Against Perpetuities.

Sec.
41-19. Prospective application.

ARTICLE 1.

Survivorship Rights and Future Interests.

§ 41-2. Survivorship in joint tenancy defined; proviso as to partnership.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

CASE NOTES

Cited in Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

(a) Wherever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility in law that the membership of the class may later be increased by one or more members not then in esse, a special proceeding may be instituted in the superior court for the sale, lease or mortgage of such real or personal property, or both, as provided in this section.

(b) All petitions filed under this section wherein an order is sought for the sale, lease or mortgage of real property, or of both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real property is situated. If the order sought is for sale, lease or mortgage of personal property, the petition may be filed in the office of the clerk of the superior court of the county in which any or all of such personal estate is situated.

(c) All members of the class in esse shall be parties to the proceeding, and where any of such members are under legal disability, their duly appointed general guardians or their guardians ad litem shall be made parties. The clerk of the superior court shall appoint a guardian ad litem to represent the interests of the possible members of the class not in esse, and such guardian ad litem shall be a party to the proceeding.

(d) Upon a finding by the clerk of the superior court that the interests of all members of the class, both those in esse and those not in esse, would be materially promoted by a sale, lease or mortgage of any such property, he shall enter an order that the sale, lease or mortgage be made, and shall appoint a trustee to make such sale, lease or mortgage, in such manner and on such terms as the clerk may find to be most advantageous to the interests of the members of the class, both those in esse and those not in esse; but no sale, lease or mortgage shall be made, or shall be valid, until approved and confirmed by the resident judge of the district, or the judge holding the courts of the district. As a condition precedent to receiving the proceeds of the sale, lease or mortgage, the trustee shall be bonded in the same manner as a guardian for minors.

(e) In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided,

(1) The trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until the occurrence of the event which will finally determine the identity of all members of the class; all such investments and reinvestments shall be made in accordance with the laws of North Carolina relating to the investment of funds held by guardians or minors; and all the provisions of G.S. 36-4, relating to the reduction in bonds of guardians or trustees upon investment in certain registered securities and the deposit of the securities with the clerk of the superior court, shall be applicable to the trustee appointed hereunder;

(2) The clerk by appropriate order, in lieu of holding, managing, investing and reinvesting the proceeds of sale, may pay or authorize the trustee to pay the entire amount of such proceeds to the living members of the class as they may be then constituted or to their duly appointed guardians, or to pay the ratable portion or portions of such proceeds to one or more of such living members or to their guardians; provided that, where the class would be closed by the death of the mother or mothers of the members of the class, said mother or mothers are living and have attained the age of 55, and upon the further condition that there be first filed with the clerk a bond conditioned upon the payment of the lawful share of any member of the class not then in esse, but who may thereafter come into being or otherwise become a member of the class, to such member or his guardian whenever he becomes a living member of the class. Such bond shall be payable to the State to the use of

the additional members of the class and shall be either a cash bond or a premium bond executed by a surety company authorized to transact business in North Carolina. The penalty of such bond shall not be less than one and one fourth the amount of the proceeds of sale. Any bond filed hereunder shall be acknowledged before and approved by the clerk of the superior court.

(f) In the event the proceeds of sale shall be paid over to a trustee and invested by him as authorized above, the entire income actually received by the trustee from such investment shall be paid by said trustee periodically, and not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment, or to the duly appointed guardians of any such living members under legal disability.

(g) In the event the court orders a lease of the property, the proceeds from the lease shall be first used to defray the expenses, if any, of the upkeep and maintenance of the property, and the discharge of taxes, liens, charges and encumbrances thereon, and any remaining proceeds shall be paid over by the trustee in their entirety, not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment or to the duly appointed guardians of any such members under legal disability.

(h) Payments of income to the living members of the class as aforesaid shall constitute a full and final acquittance and disposition of the income so paid, it being the intent of this section that only the living members of the class (as they may be constituted at the time of each respective income payment) shall be entitled to the income which is the subject of the respective payment, and that possible members of the class not in esse shall not share in, or become entitled to the benefit of any income payment made prior to the time that such members are born and become living members of the class.

(i) In the event that there has been a sale of any of the property, and the proceeds of sale are being held, managed, invested and reinvested by a trustee as provided above, any member of the class who is of legal age and who is not otherwise under legal disability may sell, assign and transfer his entire right, title and interest (both as to principal and income) in the funds or investments so held by the trustee. Upon receiving written notice of such sale, assignment or transfer, the trustee shall recognize the purchaser, assignee and transferee as the lawful successor in all respects whatsoever to the right, title and interest (both as to principal and income) of the seller, assignor and transferor; but no such sale, transfer or assignment shall divest the trustee of his legal title in, or possession of, said funds or investments or (except as provided above) affect his administration of the trusts for which he was appointed.

(j) The court shall order a mortgage of the property only for one or more of the following purposes:

(1) To provide funds for the costs and expenses of court incurred in carrying out any of the provisions of this section;
(2) To provide funds for the necessary upkeep and maintenance of the property;
(3) To make reasonable improvements to the property;
(4) To pay off taxes, other existing liens, charges and encumbrances on the property.

(k) The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. As used in this section, references to mortgages shall also apply to deeds of trust executed for loan security purposes.

(*l*) Every trustee appointed pursuant to the provisions of this section shall file with the clerk of the superior court an inventory and annual accounts in the same manner as is now provided by law with respect to guardians.

(m) The superior court shall allow commissions to the trustee for his time and trouble in the effectuation of a sale, lease or mortgage, and in the investment and management of the proceeds, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators, and collectors.

(n) Provided, however, this section shall not be applicable where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of the creation of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restrictions as to the use, form, investment, leasing, mortgage, or other disposition of the property.

(o) And provided further, this section shall not alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. But where, under the laws and legal principles existing without regard to this section, a gift, devise, bequest, transfer or conveyance has the legal effect of being made to all members of a class, some of whom are in esse and some of whom are in posse, the procedures authorized hereby may be utilized for the purpose of promoting the best interests of all members of the class, and this section shall be liberally construed to effectuate this intent. The remedies and procedures herein specified shall not be exclusive, but shall be cumulative, in addition to, and without prejudice to, all other remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

(p) The provisions of this section shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after April 5, 1949. (1949, c. 811, s. 1; 1971, c. 641, s. 1; 1997-456, s. 27.)

Editor's Note. — Subsection designations (a) through (p) were added pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

ARTICLE 2.

Uniform Statutory Rule Against Perpetuities.

§ 41-15. Statutory rule against perpetuities.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-16. When nonvested property interest or power of appointment created.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-17. Reformation.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-18. Exclusions from statutory rule against perpetuities.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-19. Prospective application.

(a) Except as extended by subsection (b) of this section, this Article applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1995. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created prior to October 1, 1995, and is determined in a judicial proceeding, commenced on or after October 1, 1995, to violate this State's rule against perpetuities as that rule existed before October 1, 1995, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. (1995, c. 190, s. 1; 1997, c. 456, s. 8.)

Effect of Amendments. — The 1997 amendment, effective August 29, 1997, inserted "created by the exercise of a power of appointment" in the last sentence of subsection (a).

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-20. Short title.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-21. Uniformity of application and construction.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-22. Supersession.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

ARTICLE 3.

Time Limits on Options in Gross and Certain Other Interests in Land.

§ 41-28. Definitions.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-29. Options in gross, etc.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-30. Leases to commence in the future.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-31. Nonvested easements.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-32. Possibilities of reverter, etc.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-33. Prospective application.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 1, 1997

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1997 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

Michael F. Easley

Attorney General of North Carolina

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